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CASES ON THE LAW

OF

PERSONAL PROPERTY

BY

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PREFACE

The author has long been of the opinion that the subject of Personal Property was deserving of more attention than is often times given to it in the law schools of this country. This seems particularly so because of the constantly increasing volume of this type of property, and the multiplicity of legal relations arising therefrom; and while many phases of the subject naturally lend themselves to separate treatment, yet there is a certain body of legal principles which underlie and run throughout the subject of Personal Property, a knowledge of which is highly desirable, if not absolutely necessary to a reasonable understanding of the law.

The purpose of this book is to set out and illustrate by concrete cases these fundamental principles.

In selecting these cases, the author has kept in mind two things; viz., first, to include no case based on obsolete law; second, to include only so much of the case as is in point.

The cases have also been arranged in such a way as to develop, in a logical order, the legal principles under discussion. As a further help to the student, a topical heading has been used for each case or group of cases, the purpose being to give the student something definite to look for. The heading, however, in no instance, reveals the holding of the case, for the author has been as careful to prevent legal conclusions being drawn from the headings as he has been particular in selecting suitable headings. The cases selected are of such a type and variety as to illustrate, in a comprehensive manner, the underlying principles of the law of Personal Property.

THE AUTHOR.

Detroit, Michigan.
February, 1918.

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Cases on Personal Property

CHAPTER I.

PROPERTY DEFINED AND CLASSIFIED.

HARVEY COAL & COKE CO. v. DILLON.

59 W. Va. 605; 53 S. E. 928; 6 L. R. A. (N. S.) 628. 1905.

Bill by the Harvey Coal & Coke Co. against C. W. Dillon, tax commissioner et al., in which a decree was entered for the defendants and the plaintiff appeals.

The facts are stated in the opinion.

BRANNON, P.—The Harvey Coal & Coke Company, a corporation, presented to the Honorable W. R. Bennett, judge of the circuit court of Fayette county, a chancery bill setting up that on 20th of May, 1893, it made a contract with Morris Harvey and others for the purchase of all the coal in the Sewell seam in certain land, together with the right to enter upon the surface and use so much of the surface as might be required in mining, for which the company was to pay Harvey and others 10 cents per ton for all coal mined; that it had actually developed the coal mine and was engaged in mining coal and making coke on the land. The bill complains that under certain legislation enacted in 1905 for the taxation of personal property C. W. Dillon, state tax commissioner, had issued such instructions to B. E. Ware and S. T. Carter, assessors of Fayette county, as would require them to assess said mining property under the head of chattels real, and that the assessors would assess it, and praying that said commissioner and assessors be enjoined from making such assessment, on the theory that it was unwarranted by law. The court sustained the demurrer to the bill and dismissed it, and the plaintiff appeals.

The deed from Harvey and others to the plaintiff contains the following language: "That the lessors do demise, let and lease for coal mining and coke manufacturing purposes for a period of thirty years from and after the 1st day of January, 1893, the following tract or body of land lying." And the lessors "do also grant unto the lessee the sole and exclusive right and privilege of mining, shipping and selling the coal from the above-leased premises from the said Sewell seam, and the right to erect and use all buildings and structures necessary for the purposes of mining, coking and shipping the coal and coke therefrom and for all other purposes connected with or necessary for the free exercise and enjoyment of the privileges above granted or demised." "It is expressly agreed between the respective parties to this lease that if, at the expiration of the period of thirty years, all of the available merchantable coal which can be profitably mined, and which is hereby let to the lessee for that purpose, has not been mined and removed, then the lessee shall have the privilege of an extension of this lease upon the same terms and conditions as those hereinbefore set forth, for a reasonable addition of time until the whole of said coal shall be so mined and removed. And it is further mutually agreed and understood that an abandonment of said premises by said lessee for a period of one year and a failure to pay royalty as hereinbefore provided for that period, then said lessee shall forfeit all right to said premises." The question of equity jurisdiction was waived, and is not considered. * * *

The Constitution of this state gives the Legislature power, indeed, a mandate, to "tax all property, real and personal." Therefore, the question is material: Does the deed in this case vest what is in law property in the Harvey Coal Company? The very suit in itself is a concession by the company that its right under said deed is property, because that suit is to defend that property against taxes. But, aside from such concessions, it is quite plain that the company's right is a property right. Anything capable of beneficial ownership is property—in this instance a valuable right arising by contract, a right to take coal from the body of land, using the land for that purpose, and convert it into salable coal, a commodity of great commercial value. "Man's rights in respect to things constitutes property." 2 Minor's Institutes 1. The company's right to produce commercial, merchantable coal for market and manufacture coke is a right in respect to the land, and that mere right, under the contract, is property. The sole and despotic dominion which one man claims and exercises over

external things of the world, in total exclusion of the rights of any other, is property. 2 Bl. Com. 2. The right to possess, use, enjoy, and dispose of a thing is property which is in itself valuable. Jones v. Vanzault, 4 McLean 603, Fed. Cas. No. 7,503; Bouvier L. Dic., word "property." A mining right in government land is property in the miner, and property of value, and may be taxed by the state, and the state may sell it for taxes. Forbes v. Gracey, 94 U. S. 762, 24 L. Ed. 313. I repeat that plainly the right vested in the coal company, and being actually exercised, is property, and the Legislature has full power to tax it in some manner. * * * In what manner shall it be taxed, as real or personal property? The Legislature has enacted that all property, real and personal, shall be taxed. The tax commissioner claims in behalf of the state that this mining right is personal property, and of that kind called by the law "chattels real," and as section 61 of chapter 35, p. 309, Acts of 1895, defines "personal property" as including chattels real, and other sections direct their taxation, his direction to assessors is to tax chattels real, as personalty, and the assessor will charge the said right of the company. The company claims that its right is not a chattel real, not personalty, but real estate, and cannot be charged to it as personal property, but can be charged only as real estate to the owner of the land itself, and that the charge of the tax to the owner covers, includes the right of the company. As the act declares that personal property shall be taxed, if the company's right is a chattel real, which always has been regarded in law as personal property, briefs in the case argue that that is alone a warrant to charge the leasehold; but, if it is a chattel real, we do not have to pass on that question, because the statute, as we hold, expressly taxes chattels real. What, then, is the character of that property conferred upon the defendant by its deed? A "freehold" is an estate for life or in fee; a "chattel real" for a less estate. Volume 22 Am. & Eng. Enc. Law (2d Ed.) defines it thus: "An estate in land other than one for life or inheritance." Tucker's Com. 2, p. 305, defines chattels real thus: "Chattels real, saith Sir Edward Coke, are such as concern, or savor of the realty: as terms for years in land, wardships in chivalry (while military tenures subsisted), the next presentation to a church, estates by a statute merchant, statutes-staple, elegit, or the like; of all of which we have already spoken. And these are called real chattels, as being interests issuing out of, or annexed to, real estate; of which they have one quality, viz., immobility, which denominates them real, but want the other, viz., a sufficient legal,

indeterminate duration; and this want it is that constitutes them chattels. The utmost period for which they can last is fixed and determinate, either for such a space of time certain, or until such a particular sum of money be raised out of such a particular income; so that they are not equal in the eye of the law to the lowest estate of freehold, a lease for another's life." See 7 Cyc. 123. Bouvier's Law Dictionary says: "Real chattels are interests which are annexed to or concern real estate, as a lease for years of land. And the duration of the lease is immaterial, whether it be for one or a thousand years, provided there be a certainty about it, and a reversion or remainder in some person." A "lease" is defined by Bouvier to be: "A species of contract for the possession and profits of lands and tenements either for life or for a term of years or during the pleasure of the parties. A conveyance by way of demise always for a less term than the party conveying has in the premises. One of the essential features is that its duration must be for a shorter period than the duration of the interests of the lessor in the land, for if he disposes of his entire interest it becomes an assignment, and is not a lease. In other words, the granting of a lease always supposes that the grantor reserves in himself a reversion." * * *

Try this property or right under these definitions. It is surely a lease, and therefore a chattel real. The fee owner carves out of his fee a particular estate and vests it in another. The coal having been developed, then, if not before, an actual estate vested as to the coal right, an entity, a distinct entity, a separate property from that remaining in the lessor. The instrument of conveyance gave certain title to the coal company, gave it an intangible right; that is, a right to produce personal property, a product of the land. This right savored of the realty, depended on it, was annexed to it, and so far answers the definition of a chattel real, which is personal estate. We say that the estate of the coal company is a lease for years, and, if so, by all authority a chattel real. * * * A lease for 99 years, renewable forever, by common law is only a chattel. 5 Am. & Eng. Enc. Law. 1024. The grant is only until all the coal be mined—in character like a lease until out of the profits a debt shall be paid, and that is a chattel real by the definitions above given. * * * The present is a mere lease under this authority.

It is said, however, that, when the coal shall be exhausted, there will be nothing to revert to the landowner, and that this repels the idea that the right of the company is a chattel real, as there must

be a reversion or remainder to make a chattel real. The answer is that the grant is not of the very coal. The phrase of the deed is not that. It leases the coal. It lets the tract itself to be used for a special limited purpose. It gives an intangible, incorporeal thing, a right to take actual possession of the tract and use it so far as necessary to take coal and make coke. When the term in this intangible right, savoring of the land, ends, that is at an end, not the mere coal. There are many cases bearing on the subject and somewhat clashing. In this, as in most other cases, there is a wilderness of decisions, and it is impossible in an opinion to attempt to analyze them. The best the court can do in the great volume of conflicting cases is to select those which, in its judgment, best suit the particular case as a basis of decision for that case. An agreement conveying all coal in a tract with the right to remove for 50 years was termed a lease. Hyatt v. Vincennes, 113 U. S. 408, 5 Sup. Ct. 573, 28 L. Ed. 1009. * * * In Haywood v. Fulmer (Ind. Sup.), 32 N. E. 574, 18 L. R. A. 491, the construction was involved of a writing which acknowledged the receipt of $175 in payment of a sand bar for the year 1890, and recited that it was for the exclusive right to all gravel and sand for that year, and excluded all other parties from the premises. The question was whether it was a lease, a license, an executory agreement, or an interest in the sand bar. The court said: "A lease may not only confer upon the lessee the right to the occupancy of the leased premises, either generally, or for the land, or for some specific purpose, or in some specific manner, or the right to occupy and cultivate and remove products of cultivation; but it may confer upon him the power to occupy and remove a portion of that which constitutes the land itself. Similar and common examples of such leases are those authorizing a lessee to quarry and remove stone, to open mines and remove ores, mineral, coal, or to sink wells for procuring and removing petroleum and natural gas. * * * In our opinion, the writing in question contains all the essential elements of a valid lease." In this case, the Indiana court did not think that the fact that a part of the substance of the soil was to be removed gave it any other cast than that of a lease. * * * A notable case is that of State v. Moore, 12 Cal. 56. The case was decided by Judges Terry, Baldwin, and Field; the last afterwards a justice of the Supreme Court. The case was maturely considered. In California mining claims were the property of the United States, and not subject to taxation. The court, however, hold that the interests of the occupants of the mining claims were a distinct

species of property, severable from the mining claim of which it was a part, and that, being so severable, it could be assessed and taxed as the property of the owner. * * *

* * * The plaintiff bases its theory that it does not own a chattel real taxable as personalty to it on certain Pennsylvania cases, and cites them with confidence. A leading Pennsylvania case is Sanderson v. Scranton, 105 Pa. 469. * * * The deed in our case grants the tract for a specific purpose; that is, with the right to mine coal, and make coke, and does not grant even the coal itself; whereas, the Pennsylvania cases show deeds granting, not the land, not the tract, but all the coal. The Court of Appeals of New York, in Genet v. Delaware Coal, 136 N. Y. 603, 32 N. E. 1080 (19 L. R. A. 127), referred to the Pennsylvania cases and said: "Whatever we may think of the general doctrine, one thing about it is quite obvious. It applies to a case, and only to a case, in which by the terms of the agreement and in contemplation of the parties the whole body of the coal, considered as of cubical dimensions and capable of descriptive separation from the earth above and around it, and as it lies in its place, is absolutely and presently conveyed. * * *

It seems that the above Pennsylvania cases holding that an oil or coal lease conveys an interest in the land conflicts with other Pennsylvania cases holding them to create a chattel interest salable on execution. In Brown v. Beecher, 120 Pa. 590, 15 Atl. 608, we find this point of law decided: "A demise of land for a term of years, 'with the sole and exclusive right and privilege during said period of digging and boring for oil and other minerals, and of gathering and collecting the same therefrom,' conveys an interest in the land, a chattel real, but none the less a chattel." * * *

* * * Just as I have once said, above, in this case the coal company has right of possession of the coal and of the land to mine that coal, but no title to the very coal or land — only a right to coal in connection with the intangible right to produce coal, to make it personal property for market. These leases, in their plain import, mean that the surface owner owns the whole land and everything in place in it, and that the lessee simply has a usufructuary right in connection with the land, right to use the land for a purpose, a terminable right, which may be long or short in years; that is, a mere chattel real, issuing out of lands, but constituting a distinct estate, a valuable one as property, and which is property, and therefore taxable, if the state see proper to do so. It must be a mere leasehold, a chattel real. Not being a freehold, and being incorporeal,

a mere right to use the land for a purpose, what can it be but a leasehold for years? It must be something in the legal eye. It cannot be nondescript. * * * These leases have, even after production, been held to still leave the oil and gas in situ in the ownership of the lessor, and not to be taxed to the lessee as real estate — I say as real estate. This shows that these instruments do not convey the oil and gas. The cases have held that they cannot be taxed as realty, but they do not pass on their taxability as personal property. Our tax laws long have provided that all personal property shall be taxed, but these leases for coal, oil, and gas have never been taxed on the personal property books in the past and the question of their taxability has never arisen. Until chapter 35, p. 285, Acts 1905, the tax law did not include chattels real as specific subjects of taxation. * * * Whether the distinction seems refined or not, it is real in legal thought, for a leasehold is not the wheat or corn produced under the right conferred by the lease. The lease is a thing apart from the commodities produced under the right conferred by it. The common law has always recognized chattels real as distinct property, taxable if the Legislature should so direct, and therefore this distinction is not new or unheard of or refined—I mean the discrimination of the leasehold from the fee ownership out of which it issues. The law has always recognized it. A chattel real is a thing of property, in and of itself, known to the law through centuries, and is not the coal, oil, wheat, or corn produced from the soil by virtue of the right arising from it. They are realty while attached to the land, personalty when severed. The leasehold is an entity per se, not an empty shadow or gauze. * * * Before 1905 the statute did not expressly charge chattels real as personal property, as does the act of 1905. True, Code 1899, c. 13, § 17, cls. 15, 16, says: "The words, 'personal estate' or 'personal property' include goods, chattels, real and personal, money credits, investments and the evidence thereof." "The word 'land' or 'lands' and the words 'real estate' or 'real property' include lands, tenements and hereditaments, and all rights thereto and interests therein except chattel interests." This shows that chattels real were never land, but personal property. From these clauses it may be argued that chattels real were taxable as personal property, especially as chapter 29, § 48, taxed "all personal property." It may be so. We do not say, as we are not passing on the prior law. * * * Acts 1904, p 56, c. 4. Acts 1905, p. 309, c. 35, makes section 61 of chapter 29 of the Code read thus: "The words 'personal property,' used in this chapter, shall include

all fixtures attached to land, if not included in the valuation of such land entered in the proper land book; all things of value movable and tangible which are the subject of ownership; all chattels, real and personal; all moneys, credits and investments as defined in the following section. The word 'land' or 'lands' and words 'real estate,' or 'real property' include lands, tenements and hereditaments, and all rights thereto and interests therein, except chattel interests and chattels real." It may be argued with force that chattels real, not being "movable and tangible," and not being mentioned for taxation in section 61 of the prior law, were not taxable, as the rule of construction is that, though certain words are given by the Code a general meaning in the construction of statutes, they would not have that meaning in construing a particular chapter or section which itself, for its own purposes, gives it a different or limited meaning. But we do not say as to this. We do say, however, that chattels real are in words made a subject of taxation by the letter of the act of 1905, on which this case turns. We cannot decide the case by decisions resting on a prior different statute.

* * * The old law did not include leaseholds in the valuation of the land or mineral in place, neither does the new, but the new law charges chattels real as personal property. For the first time, the new law selects them for taxation in words. * * * As above stated, the statute has never in words required chattels real to be separately assessed until the act of 1905. That makes them specific subjects of taxation. Never has there been a time when by common law a chattel real had not legal entity as an estate of value, a property, distinct from the body of land of which it savored, and therefore the state has indisputable power to tax it as such distinct property. By the very act of taxing it the Legislature has given the chattel real, for purposes of taxation, distinct existence, if it had not had it before, and made it a tax subject. No matter how many estates or interests in land there may be, the state can, if it choose, tax each separately. From law cited above, property in any form can be taxed. "The term 'property,' standing unqualified in a Constitution with statutes designating subject of taxation, includes both real and personal property, or estate, intangible, as well as tangible, rights of value." * * *

* * * The old section defined personal property so as not to include chattels, as seen above in its quotation. It did not make personal property, in terms, include chattels real. The new sec-

tion does, and moreover excludes from the meaning of "land" chattels real. How can it be doubted for a moment that the intent was to tax chattels real, not as land, but as personal property? The new section inserts "chattels real" as coming within the meaning of personal property, and excepts chattels real from land taxation, and new section 63, as also section 12, says that "all personal property" shall be taxed and hence chattels real must be taxed. * * *

* * * The Legislature in 1905 simply taxed what never had been taxed in taxing the leaseholds of the lessee. State v. South Penn, 42 W. Va. on page 99, 24 S. E. on page 695, says this: "What, then, is the subject-matter of the act of reassessment of 1891, and does the property [these oil leases] belong to such subject matter within the meaning of the act? We may expect to find the object, the main general purpose, of the act expressed in the title. The title is "an act to provide for the reassessment of the value of all real estate within this state. By a statutory rule of construction, the word 'land' or 'lands' and the words 'real estate' or 'real property' include lands, tenements and hereditaments, and all rights thereto, and interests therein, except chattel interests, unless a different intent on the part of the Legislature be apparent from the context. See Code, 1899, c. 13, § 17, par. 15. In the assessment law, the term 'property' is used not in the sense of right of ownership, but of the thing owned, which is listed for taxation opposite the name of the owner. The context shows that oil and gas underlying the surface, and within the location of land, shall be considered in ascertaining the value of such land, and, when oil or gas privileges or interests are held by a party exclusive of the surface, the same shall be assessed separately to such parties—the land to the one, the oil privilege to the others." * * *

* * * The Legislature has plainly expressed its will that these chattels real shall be taxed, and, it being within the taxing power of the state, it ill becomes a court to defeat and frustrate the public and legislative will.

For these reasons we affirm the decree of the circuit judge.

Affirmed.[1]

[1] See Childs' Personal Property, § 1.

CITY OF ST. LOUIS v. HILL.

116 Mo. 527, 22 S. W. 861. 1893.

The defendant, Hill, was convicted of violating a city ordinance.

The facts as stated by the court are as follows:

The defendant was arrested upon an information lodged against him in the first district police court of St. Louis for violating Ordinance 16,450 of the plaintiff city, relating to Forest Park boulevard. * * * The record discloses that on the 11th day of November, 1892, the defendant, on premises on the north side of Forest Park boulevard, between Cabanne street and Vandeventer avenue, of which the defendant was then and there the owner in fee, which premises were within the district covered by said Ordinance No. 16,450, in the city of St. Louis, did erect a certain dwelling house within the distance of 40 feet, to wit within 15 feet from the north line of said Forest Park boulevard, said house not conforming to the uniform building line of said Forest Park boulevard, as prescribed by said Ordinance No. 16,450. The defendant filed a written motion for discharge, upon the ground that the said Ordinance No. 16,450 is unconstitutional and void, in that it is contrary to and in violation of sections 20, 21, and 30 of article 2 of the constitution of the state of Missouri. The St. Louis court of criminal correction, to which court the case had previously been appealed from said first district police court, overruled said motion, found the defendant guilty, and fined him $500 and costs. Hence this appeal. * * *

SHERWOOD, J.—As already disclosed by the record, the constitutionality of what is commonly known as the "Boulevard Law" is called in question by this appeal. The provisions of the organic law cited by defendant as pertinent to this controversy are these: "Sec. 21. That private property shall not be taken or damaged for public use without just compensation. Such compensation shall be ascertained by a jury or board of commissioners of not less than three freeholders, in such manner as may be prescribed by law; and until the same shall be paid to the owner, or into court for the owner, the property shall not be disturbed, or the proprietary rights of the owner therein divested." "Sec. 30. That no person shall be deprived of life, liberty, or property without due process of law."

Article 2, Const. 1875. It is urged on behalf of plaintiff that there has been no "taking" of private property under this law and ordinance, because the "title" to the property, and the right to use the same, are still in the defendant. This contention brings into prominence the true import of the word "property." The general result of various definitions of the term is that it is the exclusive right of any person to freely use, enjoy, and dispose of any determinate object, whether real or personal. 1 Bl. Comm. 138; 2 Aust. Jur. 817, 818; 19 Amer. & Eng. Enc. Law, 284, and cases cited; Lewis, Em. Dom. §§ 57-59; Eaton v. Railroad Co., 51 N. H. 504; Thompson v. Improvement Co., 54 N. H. 545; Wynehamer v. People, 13 N. Y. 378. Sometimes the term is applied to the thing itself, as to a horse or a tract of land. These things, however, though the subjects of property, are, when coupled with possession, but the indicia, the visible manifestations, of invisible rights, "the evidence of things not seen." Property, then, in a determinate object, is composed of certain constituent elements, to wit, the unrestricted right of use, enjoyment, and disposal of that object. It follows from this premise that anything which destroys or subverts any of the essential elements aforesaid is a taking or destruction *pro tanto* of property, though the possession and power of disposal of the land remain undisturbed, and though there be no actual or physical invasion of the *locus in quo*. Cooley, Const. Lim. (6th Ed.) 670; Wynehamer v. People, 13 N. Y. loc. cit. 433, per Selden, J.; People v. Otis, 90 N. Y. loc. cit. 52, per Andrews, C. J. The use of a given object is the most essential and beneficial quality or attribute of property. Without it, all other elements which go to make up property would be of no effect. If the city were allowed to deprive the defendant of the use of his entire lot, it would leave in his hands but a barren and Barmecidal title; and what is true of property rights as an integer is true of each fractional portion. If plaintiff's theory be correct, then the city could pass and enforce an ordinance which would deprive defendant of the use of his entire lot, and still there would be no "taking," within the terms of section 21, art. 2, of the constitution, and consequently no right to compensation. The statement of such a position is sufficient to accomplish its utter repudiation. * * *

* * * For reasons aforesaid, we reverse the judgment, and, as it is apparent that the city has no standing in court, we will not remand the cause. All concur.[2]

[2] See Childs' Personal Property, § 1.

PERSONAL PROPERTY DEFINED.

BOYD v. CITY OF SELMA et al.

96 Ala. 144, 11 So. 393, 16 L. R. A. 729. 1892.

[William E. Boyd filed bill against the city of Selma and A. J. Goodwin, tax collector, to restrain said parties from collecting a tax. The defendants demurred to the bill and the demurrer was sustained, whereupon the complainant appealed.]

The facts are stated in the opinion.

THORINGTON, J.—Appellant filed his bill of complaint in the chancery court of Dallas county, averring the following state of facts: Appellee Selma is a municipality incorporated under the laws of this state by that name, and among other powers conferred on it by its charter is the following: "That the mayor and councilmen of said Selma shall have the power to levy taxes on real and personal property, capital employed in any business carried on in said city," etc. Since 1884 the said city has had an ordinance in operation and effect authorizing and providing for the taxation of "all moneys loaned, and their value, after deducting the indebtedness of the taxpayer." On the 1st day of May, 1890, which was the beginning of the city tax year for 1890-91, appellant, who resides in said city, duly returned his list of property taxable by said city to the city assessor, showing real property to the amount of $3,000 in value, and personal property to the value of $533, of which personal property $200 was exempt by law from taxation, and which exemption was so claimed on said list. After said list was so returned the assessor, without appellant's knowledge, added thereto, under the head of "All moneys loaned and solvent credits, or credits of value, and their value, after deducting the indebtedness of the taxpayer," an item of $25,262, which is stated by the assessor in writing on said list to have been "added from information from county assessor's book," which item had been assessed to appellant for state taxation in Dallas county for the pending year. Said sum represented negotiable promissory notes, for so much money loaned by appellant, payable to him or his order in Birmingham, Ala., and are secured by mortgages on real property in said last-named city. The makers of said notes all reside in Birmingham, and the notes themselves, since March, 1890, have been and now

are in said city, in the hands of appellant's agent there, for collection of interest and the reinvestment thereof, with the exception of one note for $100, which is in appellant's possession in Selma. Appellant, before his bill was filed, applied to the mayor and councilmen of Selma to cancel the said item of $25,262, so added to his tax list by the assessor, but, after hearing on his petition, they refused so to do. * * * The bill prays for an injunction to restrain the collection of the alleged illegal portion of the tax. * * * To this bill appellees demurred, the demurrer was sustained by the chancery court, and, appellant failing to amend his bill, it was dismissed. * * *

The two controlling questions are whether the bill makes out a case coming within some ground of equitable jurisdiction connected with the alleged illegality of the tax, and whether solvent credits or negotiable promissory notes are taxable at the domicile of the owner, or whether the *situs* of such property, and not the domicile of the owner, determines the liability to taxation, and these questions we will consider in the inverse order to that in which they are above stated. Preliminary to these two questions, however, we will notice the proposition argued by appellant's counsel, that negotiable promissory notes are not embraced in the term "personal property," found in section 27 of the charter of Selma, above quoted. * * * The state has power to tax, and does tax, solvent credits, including negotiable promissory notes. It appears, from an inspection of the charter of Selma (Acts 1882-83, p. 396) that the power is not conferred on said city to tax such property *eo nomine,* but the power is given in express terms to tax real and personal property; and, if the term "personal property" can be said to embrace choses in action, then it is undeniable that the charter confers upon the city express power to tax that species of property. This is as truly axiomatic as that the whole includes all its parts. In its general or ordinary significance, the term "personal property" embraces all objects and rights which are capable of ownership, except freehold estates in land, and incorporeal hereditaments issuing thereout, or exercisable within the same." 18 Amer. & Eng. Enc. Law, p. 408. And, when used in statutes authorizing the imposition of taxes, the word "property," without the qualifying term "personal," will be held without further signification to include solvent credits. 1 Desty, Tax'n, pp. 318, 319; Cooley, Tax'n, p. 372; Association v. Austin, 46 Cal. 415; People v. Park, 23 Cal. 138; Louisville v. Henning, 1 Bush. 381; Catlin v. Hull, 21 Vt. 152. So in this state the words "personal

property," employed in exemption statutes, have been construed to include money, choses in action, and even a claim for damages resulting from negligence. Borden v. Bradshaw, 68 Ala. 363; Darden v. Reese, 62 Ala. 311; Williamson v. Harris, 57 Ala. 40.

In the definition of terms given in the Code, § 2, subd. 3, the words "personal property" include "money, goods, chattels, things in action, and evidences of debt," etc.; but that definition only applies to the words "personal property," as used in the Code, and is not a general, authoritative definition, attaching to said terms, as found in all legislative enactments of this state, general and special. Whatever effect this section may have upon general enactments since the Code in which these words occur, when found in special statutes enacted either before or since the Code, they have the usual and ordinary meaning attaching thereto, unless otherwise limited or qualified by the context. In the section of the charter of Selma herein quoted we do not find in the context any associated words, which give to the term "personal property" a narrower or different meaning from that found in the authorities we have cited above. True, some of the items of personal property specifically mentioned in the section would, according to the general definition given in the citations, fall within the generic term, and some would not; but the former appear to have been particularized *ex industria,* or by way of precaution, and not with the intent to limit the preceding general words. We think it clear that the term "personal property," as used in section 27 of the charter of said city, includes solvent credits and choses in action, and consequently that such property is liable to taxation by said city in the manner, and to the extent provided by its charter. Practically the same question was settled by this court in the case of St. John Powers & Co. v. Mayor, etc., 21 Ala. 224, where it was held that the charter of that city, which authorized it to tax "real and personal estate within the city," included the power to tax bills of exchange, notes, etc. To the same effect is the case of Town of Paris v. Farmers' Bank, 30 Mo. 575.

* * * We have examined the authorities cited by appellant to the effect that the words "personal property" do not include solvent credits or choses in action, and also that the power given to a municipal corporation to tax property within the city applies only to visible, tangible property within the corporate limits; but they are either predicated on statutes, the particular phraseology of which is materially variant from the charter of Selma, or they are in conflict with the weight of authority. For instance, in the case of Pullen

v. Board, 68 N. C. 451, the court held that the city of Raleigh had no power to tax debts and securities. But it was so held on the ground that the charter enumerates, *nominatim,* each subject of taxation, and that no one subject so specified, "by the utmost stretch of construction, can be made to embrace debts and securities for money." Also that the words "real and personal property" are used in the state constitution in a sense to exclude "credits and investments." And in the case of Bank v. Huth, 4 B. Mon. 423, no question of taxation was involved. It was simply a question whether the words "real or personal estate," as employed in a statute requiring mortgages to be recorded, embraced choses in action or claims for debts; and it was held they did not, because the statute designated the place for recording as the county "in which the estate or greater part thereof lies;" that only such property was embraced in the words "personal estate," or was capable of having an actual *situs,* and therefore "may be or lie in a certain place or county;" and that choses in action were not capable of a *situs* or local position. In the case of Johnson v. City of Lexington, 14 B. Mon. 521, it was held that the terms "personal property" and "personal estate," as used in the Lexington city charter, do not embrace debts and other choses in action, but embrace only visible property, and that the city had no power to tax personal property without the city, but that such power is confined to property within the city. But the decision was put on the ground that the language of the charter "renders it reasonably certain that the power conferred was only intended to embrace such personal estate as is within the city," and it was held that the words "personal property" and "personal estate" did not include debts and other choses in action, because at that time the state "had not adopted the principle of taxation by which the money and choses in action of the citizen are not made liable to taxation;" and that it could not, therefore, be presumed that the state then intended to confer on the city authorities a power of taxation which it did not itself exercise. * * * Mr. Cooley, in his work on Taxation, (2d Ed. p. 22) in speaking of debts, says: "They are not the property of the debtors, in any sense; they are the obligations of the debtors, and only possess value in the hands of the creditors. With them they are property, but to call them property in the hands of debtors is a misuse of terms." The conclusion we reach from the principles herein discussed and the authorities cited is that the money loaned, or solvent credits, or choses in action, referred to in the bill of complaint, are properly taxable in and by the city of Selma,

where appellant resides. The city charter authorizes the assessor to assess property for escaped taxes, on information, and no question is raised by appellant as to the regularity of the assessment.

* * * There was no error in the decree of the chancery court sustaining appellees' demurrer, and dismissing the bill. Its decree is accordingly affirmed.[3]

DISTINCTION BETWEEN REAL AND PERSONAL PROPERTY.

HUNT, TRUSTEE v. BULLOCK et al.

23 Ill. 320. 1860.

[Bullock et al. obtained a judgment against the Terre Haute, Alton and St. Louis Railroad Co. and levied an execution on some fuel and office furniture owned by said company. One Alva Hunt, as trustee of the bondholders of the railroad company, filed a bill to restrain Bullock et al. from selling, on execution, said fuel and furniture.

A demurrer to the bill was sustained and complainant appealed.]

MR. JUSTICE WALKER.—We shall first examine whether fuel and office furniture, when owned by a railroad company, is real estate, and the company, thereby, not required, in executing a mortgage on such articles, to comply with the chattel mortgage law. It is too plain a principle to require argument or reference to authorities, that there is a marked difference between real and personal estate. All commentators and judicial determinations on the subject, have held that real estate embraces such things as are permanent, fixed and immovable, and which cannot be carried out of their places, as lands and tenements. While personal property is defined to be goods, money, and all other movables which may attend the person of the owner, wherever he may think proper to go. While, however, these broad and well-defined distinctions are universally acquiesced in and enforced, both in this country and in Great Britain, as being elementary, and lying at the very foundation of our system of jurisprudence, there have been and are still some exceptions, such as trade fixtures and emblements on the one hand and heir-looms on the other.

[3] See Childs' Personal Property, § 2.

This property, as all must perceive, is not permanent, fixed and immovable, but is detached and separate from the road and its lands. It may be with convenience removed from place to place, and does not in the very nature of things bear the slightest resemblance to real property. It on the contrary has every element of personalty, and cannot be considered anything else, under any known rule of law. It has not been held, nor was it urged, that such property falls within the exceptions governing trade fixtures or implements, nor can it be so regarded. They, in their nature and use, resemble real estate or real fixtures no more than do the money, books and stationery of the company. As between individuals, such property has never been regarded as real estate or fixtures, but has, in all conditions and under all circumstances, and for every purpose, been regarded as what it simply is, personal property. These distinctions are so plain and familiar, that every class of men, in their business affairs, act upon and conform to them. If, as between individuals, a court were to announce a contrary rule, it would startle every class of men as new and unheard of in our system of jurisprudence.

Our legislature has failed to declare such property, when owned by incorporated bodies, to be real estate, nor does any rule of the common law make such a distinction in its favor. The common law, as it heretofore existed and now exists, with all of its expansive nature and its adaptation to new and varying circumstances of a community, has always been applied to bodies politic and corporate, as it is to individuals. All their exemptions from its operation are found in their charters or in the general statutes of the State. The charter of this company grants no such immunity from its operation, and no general law of the State has given such bodies the right to hold personal property as real estate. Nor has it ever been held that because personal property is convenient, or even necessary to the enjoyment of real estate, that it should for that reason be held and treated as such. Were such a rule adopted, it would convert almost every description of chattels into realty. The teams, implements, money and stock of the agriculturist, the capital and stock of the mechanic, the miner, the manufacturer, the merchant, and every man's household furniture and property, would fall fully within the reason of such a rule. Such has never been claimed for individuals, and no reason is perceived in justice, or upon principle, why corporate bodies have any higher or greater claims to such exemption. They are unquestionably, outside of

their charter privileges, entitled to the benefits of the rules of law, as are individuals, but to nothing more.

It is only since railroad mortgages have come to be discussed, that any attempt has been made to treat what are undeniably and palpably personal chattels as any thing else, and even then, when ingenuity had exhausted itself in endeavors to show that fuel and office furniture and the like were real estate, or in equity should be treated as such, for the benefit of mortgagees, the result has proved a signal failure. In the absence of any common law rule, or statutory enactment making these articles real estate, we must hold, whether they be owned by a railroad company or an individual, that they are personal property, and as such, are subject to all of its incidents. To hold otherwise would be to violate elementary principles, recognized and acted upon wherever the common law obtains.

* * * But that fuel, office furniture, stationery, materials for lights, and all other detached property of that character is personalty, we have no hesitation in determining. * * * To hold otherwise would, it seems to us, involve us in an absurdity, if followed to its inevitable consequences, that we are not prepared to adopt, for the purpose of relieving against what might appear to be a hardship in a particular case. Whenever the law is warped for such a purpose, it must terminate in absurdity, and lead to the perpetration of great injustice.

The decree of the court below in sustaining the demurrer to, and the dismissal of complainant's bill is affirmed.

Decree affirmed.[4]

[4] See Childs' Personal Property, § 3.

start Sat. Oct 9, 1920

CHAPTER II.

CHATTELS REAL.

LEASEHOLDS.

BUHL et al. v. KENYON.

11 Mich. 249, 83 Am. Dec. 738. 1863.

The facts are stated in the opinion.

CAMPBELL, J.—The plaintiffs in error brought ejectment in the court below as execution purchasers of the interest of one of two tenants for years of certain premises in Detroit, which were sold as real estate.

The first question presented is whether such an interest is real estate within the meaning of the statutes relating to the levy and sale of lands on execution. The statute provides that, where not inconsistent with the manifest intent of the Legislature, the word "land" or "lands," and the words "real estate shall be construed to include lands, tenements and real estate, and all rights thereto, and interest therein:" 1 Comp. L., § 2.

By section 3119 of the Compiled Laws, provision is made for selling "all the real estate of a debtor, whether in possession, reversion, or remainder, including lands fraudulently conveyed with intent to defeat, delay or defraud his creditors, and the equities and rights of redemption hereinafter mentioned." By section 4463, in the general chapter on judgments and executions, it is declared that "all chattels, real or personal, and all other goods liable to execution by the common law, may be taken and sold thereon," except as is otherwise provided by law.

As a leasehold interest of this kind is a chattel interest, and as it is in this last section classed among personal property, if it should be held included in the class of real estate also, some confusion must necessarily arise. But as we have heretofore held in Trask v. Green, 9 Mich. 358, and Maynard v. Hoskins, 9 Mich. 485, the

statute definition of real estate does not apply in its full breadth to execution sales, because incompatible, when thus applied, with the general intent as well as the special clauses of the statutes governing these. We think the case of a chattel interest is not within the law applicable to the sale of lands on execution. Such interests have always been sold as personalty on common law executions, and it would require plain language to deduce an intent to make them disposable otherwise. But apart from the fact that they were so liable when lands were not, the statutory provisions governing real estate sales are not compatible with the idea that these can be included within them. There are multitudes of leases for short periods where a sale would be entirely nullified by a fifteen months' period for redemption. The whole machinery for land sales is devised with a view to reach freehold estates. The lands are sold in parcels, the papers are filed in the office of the register of deeds, successive sales may be had of the rights to redeem, and various other incidents—all inconsistent with any such interest as is here in question—show that the property sold as real estate is an estate of a more permanent character, and involving a different kind of ownership.

It is claimed, however, that a sale which will pass realty must be good to pass personalty. So far as the documentary evidences of sale are concerned, this is true. But a sale on execution is designed to produce the best price which can be obtained; and a sale on condition that no title shall vest for fifteen months would, under ordinary circumstances, render a lease nearly valueless, besides involving the danger of forfeiture. No bidder would give for the shortened term the value of the full term.

We, therefore, are of opinion that no title passed to the plaintiffs by their execution sale. As this disposes of the whole controversy, we make no reference to the other points involved.

The judgment below is affirmed, with costs.

The other justices concurred.[1]

[1] See Crouse v. Mitchell, 130 Mich. 347, 90 N. W. 32; Harvey Coal & Coke Co. v. Dillon, p. 1.
See Childs' Personal Property, § 9.

KNAPP et al. v. JONES.

143 Ill. 375, 32 N. E. 382. 1892.

The facts are stated in the opinion.

MR. JUSTICE WILKIN.—This is an appeal from a judgment of the appellate court for the second district, affirming a decree of the circuit court of LaSalle county. The opinion of the appellate court, by UPTON, J., is as follows:

"This was a bill in equity, filed in the circuit court of LaSalle county, to foreclose a trust deed executed by George L. Blanchard and his wife to Almeron K. Knapp, as trustee, dated July 30, 1885, and duly recorded in LaSalle county. It was given to secure an indebtedness to Noble Jones for the sum of $32,000. The property in the trust deed described was a large amount of real estate in LaSalle county, together 'with the grain elevator and the leased ground upon which it was erected, owned by the grantor, and situate upon the right of way of the Illinois Central railway, at Lostant, in said county.' The grain elevator in the trust deed described was erected upon a portion of the right of way of said railway company, pursuant to a lease by such company to said Blanchard, bearing date June 18, 1884. The demise was for a period of one year, and required the lessee, Blanchard, to erect thereon a grain elevator or warehouse, and to operate and conduct the same in the manner provided in said demise. Blanchard erected the grain elevator upon stone foundations set in the ground below the frost line, and placed therein all requisite machinery and facilities for handling grain, which were intended to be permanent, as much so as stone and iron could be.

"On the expiration of the first term of one year the lease was twice thereafter extended in writing, the last extension terminating July 1, 1888. By the terms of the lease the railway company had the right to terminate it at any time, upon giving sixty days' notice, and the lessee, Blanchard, had the right, at any time before the termination of the lease, to remove all buildings by him erected on the leasehold premises.

"The lessee, Blanchard, continued to use, occupy and operate the elevator by the acquiescence, if not the actual consent, of the railway company, lessor, until August 23, 1887, when possession thereof was taken by the creditors of Blanchard upon writs of attachment, which subsequently were merged into judgment, and

the leasehold interest of Blanchard was thereunder sold to Andrew J. O'Connor, who subsequently sold and conveyed the same to appellant Knapp. Thereupon this bill was filed for the purpose stated, alleging the insolvency of Blanchard, and that the property in the trust deed described was inadequate security, etc., and asking for a receiver, etc. * * * The cause was heard in the court below, and a decree passed for appellee Noble Jones, therein finding that appellant Knapp's title to the elevator, derived under execution sales, was subject to the lien of the trust deed, and directing a sale of the mortgaged estate by the master, etc. The decree directed that one-half of the costs be paid by Doyle, the constable, and the balance by Knapp. From that decree this appeal is prosecuted.

"The principal question presented upon this record, as stated by appellant's counsel, is, whether the elevator in question, built by Blanchard upon the right of way of the railroad company under a lease for one year (and subsequently renewed in writing for two years), with a provision therein that the lessor may terminate such lease at any time upon sixty days' notice, and that the lessee may remove the buildings by him erected thereon, at any time before the lease expires, is personal property, within the meaning of chapter 95 of the Revised Statutes, entitled 'Chattel Mortgages,' so that at the expiration of two years from the date of the mortgage upon it, if possession is not taken by the mortgagees, it becomes subject to sale upon execution, free from the mortgage lien. The answer to this question must depend upon the legal classification to which property of the kind here in question is in law assigned,—whether chattel real or chattel personal. That the leasehold in question, and the right of the lessee therein, with buildings erected thereon under the lease, is a chattel, none will deny. If this elevator and leasehold of Blanchard is to be classified and regarded as a chattel real, as held by the court below, then there was no error in the trial court holding the lien of the trust deed paramount to the right of the purchaser thereof at the execution sale, upon subsequent judgments against the lessee Blanchard. We think that question settled, at least in this state, and that the property in question is a 'chattel real,' and under our statute is classed as real estate. Bouvier's Law Dic. title 'Chattels Real;' 2 Blackstone's Com. 387; 2 Kent's Com. 342; 1 Washburn on Real Prop. chap. 1, sec. 17; Griffin v. Marine Co., 52 Ill. 130; Conklin v. Foster, 57 id. 105; Dobschuetz v. Holliday, 82 id. 373; Willoughby v. Lawrence, 116 id. 11; Kankakee Coal Co. v. Crane Bros. Manf. Co., 28 Ill. App. 371.

"Section 38, chapter 30, of the Revised Statutes of 1874, pro-

vides that the term 'real estate,' as used in that act, shall be construed as co-extensive in meaning with lands, tenements and hereditaments, and as embracing 'chattels real;' and section 31 of the same chapter provides, that deeds, mortgages and other instruments in writing relating to real estate shall be deemed, from the time of being filed for record, notice to subsequent creditors and purchasers, although not acknowledged or proven according to law. It is apparent, therefore, that by the express terms of the statute the elevator and leasehold interest of Blanchard were 'chattels real,' and the deed of trust was valid as a real estate mortgage, and the circuit court properly so held.

"Perceiving no error in the proceedings in the trial court, or in the decree as rendered therein, the decree is affirmed."

We have examined the argument of counsel for appellants in support of the several grounds of reversal here urged, but are of the opinion that the case was properly decided by the circuit court, and that sufficient reasons for the affirmance of that decision are given in the foregoing opinion.

The judgment of the appellate court will be affirmed.

Judgment affirmed.[2]

FIXTURES—NATURE OF.

WOLFORD v. BAXTER et al.

33 Minn. 12, 53 Am. Rep. 1, 21 N. W. 744. 1884.

The facts are stated in the opinion.

MITCHELL, J.—In February, 1881, the defendants Mueller and Siebold, being the owners of certain real estate upon which was situated a brewery, executed a mortgage on the premises to the plaintiff. In February, 1883, the same parties executed a chattel mortgage on the article in controversy to defendant Baxter. The plaintiff claims that these articles were fixtures constituting a part of the realty, and as such were covered by his mortgage on the land. On the other hand, defendant Baxter claims that they were chattels. This presents the only point in the case. The court below held that the air-pump and the iron pump, which were fastened to the

[2] See Childs' Personal Property, § 9.

building, were a part of the realty and covered by plaintiff's mortgage. Hence, as Baxter does not object, these articles need not be considered. It is too plain to require argument that the loose circular rotary pump, the swimmers, ice tools, pitching machine, and kettle were mere chattels. In fact, plaintiff makes no point as to them. This reduces the controversy to three classes of articles, to-wit, 47 large coops, casks, or hogsheads used for holding and storing beer, 12 fermenting tubs, and 1 copper cooler. In fact, they may be reduced to two classes, for the coops and fermenting tubs stand on the same footing. The case was submitted in the court below upon an agreed statement of facts, which we will leave to be set out, so far as material, in the statement of the case.

It has often been remarked that the law of "fixtures" is one of the most uncertain titles in the entire body of jurisprudence. The lines between personal property and fixtures is often so close and so nicely drawn that no precise and fixed rule can be laid down to control all cases. It is difficult, if not impossible, to give a definition of the term which may be regarded of universal application. Each case must be more or less dependent upon its own peculiar facts. Whether a thing is a fixture or not has been sometimes said to be a question partly of law and partly of fact. Almost every court and every text writer has attempted to define the term. None of these are infallible or of universal application; but they are of service in determining whether an article is or is not, in a given case, a fixture. These definitions may be found collected in almost any law dictionary or text-book on the subject. We shall neither quote them nor attempt to give a definition of our own, but simply say that they all agree that "fixtures," in the primary meaning of the term (and distinguished from movable or tenants' fixtures), means chattels annexed to the realty so as to become a part of it.

While not agreeing as to the necessity for, or the degree of importance to be attached to, the fact of actual physical annexation, yet the authorities generally unite in holding that, to constitute a fixture, the thing must be of an accessory character, and must be in some way in actual or constructive union with the principal subject, and not merely brought upon it; that in determining whether the article is personal property, or has become a part of the realty, there should be considered the fact and character of annexation, the nature of the thing annexed, the adaptability of the thing to the use of the land, the intent of the party in making the annexation, the end sought by annexation, and the relation of the party making it to the freehold. These other tests named,

while having an important bearing upon the questions, whether there has been an annexation, and, if so, its effect, do not, however, do away with the necessity of annexation, either actual or constructive, to constitute a fixture. This would involve a contradiction of terms, and wipe out the fundamental distinction between real and personal property. A thing may be said to be constructively attached where it has been annexed, but is separated for a temporary purpose, as in the case of millstones removed for the purpose of being dressed, or where the thing, although never physically fixed, is an essential part of something which is fixed; as in the case of keys to a door, or the loose cover of a kettle set in brickwork. It is, perhaps, somewhat on this principle that the permanent and stationary machinery in a structure erected especially for a particular kind of manufacturing has been held fixtures, although very slightly or not all physically connected with the building; because, without it, the structure would not be complete for the purpose for which it was erected. Ponderous articles, although only annexed to the land by the force of gravitation, if placed there with the manifest intent that they shall permanently remain, may be fixtures.

But, while physical annexation is not indispensable, the adjudicated cases are almost universally opposed to the idea of mere loose machinery or utensils, even where it is the main agent or principal thing in prosecuting the business to which the realty is adapted, being considered a part of the freehold for any purpose. To make it a fixture, it must not merely be essential to the business of the structure, but it must be attached to it in some way, or, at least, it must be mechanically fitted so as, in ordinary understanding, to constitute a part of the structure itself. It must be permanently attached to, or the component part of, some erection, structure, or machine which is attached to the freehold, and without which the erection, structure, or machine would be imperfect or incomplete.

On applying these rules and tests to the case in hand, we are of opinion that the coops or casks and tubs in controversy have none of the characteristics of fixtures. They were not actually annexed to the freehold, nor were they of a nature to be deemed constructively affixed to the realty. It is true that they were well adapted to and necessary for carrying on the brewing business, to which the premises were appropriated; but this of itself is quite an immaterial element in determining the nature of an article. Many articles of a purely personal nature are useful and necessary

in carrying on a particular business which can in no just sense be termed fixtures. These articles were no more essential to the brewing business than were the ice tools, pitching-machine, or ordinary beer kegs, or are farm machinery for the business of husbandry. It is also true that it is stipulated that these casks and tubs are constructed for the purpose of being put into and used in this brewery, and were placed there with intent that they should remain there for permanent use, and that the vaults were excavated for the special purpose of storing therein *such* hogsheads, and that the ice-house was constructed for the special purpose of placing therein fermenting tubs, in the first story, and casks in the second; but it does not appear that the vaults were excavated or the ice-house built in any special shape to suit these particular casks or tubs, or that the casks or tubs were constructed to fit into any particular place in the vaults or ice-house. They were adapted to receive any other casks or tubs as well as these, and any other such casks or tubs would have been just as well adapted to be stored there as these.

It is expressly stipulated that these tubs and hogsheads were of the same description as those in general use in breweries, and that they might be sold to other brewers for the purposes for which they were constructed. They were readily removed from the vaults and ice-houses, and in fact were removed once a year or oftener outside, for the purpose of being pitched or repaired. We can see no particular difference between them and ordinary beer kegs, except that they were used exclusively inside of the vaults or ice-houses, and being larger were somewhat more difficult to move. The intent that they should remain in this brewery for permanent use there is unimportant. Intent alone will not convert a chattel into a fixture. A farmer may take a plow, or any other farm implement, upon his farm with intent to keep and use it there until it wears out, but this will not make it real estate. Moreover, it will be noted that it is not stipulated that these articles were placed in the brewery with intent to make them a permanent accession to the freehold, but merely that they should remain there for permanent use. What has been said as to the hogsheads and tubs will in the main apply to the copper cooler. It was a loose, movable utensil, the same as in common use in breweries. The only ground for a distinction between this and the other articles is that, when in use, it was connected by a hose to a stationary water-tank, in order to permit water to pass through it. When not in use the hose was disconnected and the cooler was laid away. The object and

purpose of this temporary annexation was not to make the cooler a permanent accessory to the building, but for the purpose of using the article as a chattel. It may be, on the facts, a little closer case than that of the hogsheads and tubs, but the court below having found it to be personal property, we see no occasion to disturb his decision.

Order affirmed.[3]

CRIPPEN v. MORRISON et al.

13 Mich. 23. 1864.

The facts are stated in the opinion.

CAMPBELL, J.—Defendants in error brought an action of trover for the conversion of a steam engine and its appurtenances, which they claimed under the following circumstances: Francis A. Hall mortgaged certain lands in Batavia, Branch county, amounting to 572 acres, to one Hiscock, October 22d, 1856, for $4,000; and this money was borrowed under a verbal agreement that Hall should erect a saw-mill on the premises. On the same day, Hall contracted with defendants in error to build and put up the engine in question, he agreeing to put up a suitable mill frame and engine house to receive it, and upon its acceptance to execute back a chattel mortgage on the engine, and a mortgage upon the land, which was already subject to the Hiscock mortgage. It was expressly agreed that the engine and appurtenances should continue to be the property of defendants in error, until they should receive the mortgage securities on the chattels, and on the real estate. On April 15th, 1857, these securities were delivered, the machinery having been accepted. They were properly filed and recorded, and kept alive till suit. October 10, 1857, Hiscock commenced a foreclosure suit, making defendants in error parties with the other persons interested in the land. A decree was obtained December 31, 1858, for the amount of $820, then due; and June 25, 1860, a further decree was obtained for installments subsequent to the first decree. Before the first decree, and in October, 1857, about two weeks after the foreclosure suit was commenced, Hiscock assigned $3,860.44 of the mortgage money to one William P. Morley, who was not a party

[3] See Childs' Personal Property, § 10.

to the bill. August 24, 1858, and before any decree, Morley assigned to Crippen (the defendant below, and plaintiff in error), informing Crippen that he had no interest in the machinery. December 31, 1859, Hiscock assigned the remaining interest in the mortgage to Crippen. Prior to July 26, 1858, and before Crippen obtained any interest in the mortgage, the machinery was taken down, and stored in the mill building. One Laman then became owner of the property and machinery mortgaged, and, in Crippen's presence, promised to pay the Hiscock mortgage, and the claim of defendants in error. Laman subsequently put up the machinery again in the mill. October 4, 1860, Crippen bid in the lands on the foreclosure sale, and the sale was confirmed October 30th. He took possession of everything, and subsequently took down the machinery, using a part in another mill, and storing the rest. In November, 1860, a demand was made for the machinery by defendants in error, at the mill. In February, 1861, a further demand was made at Crippen's barn, where some of the property was then stored. He made no reply whatever to either demand. The circuit court gave judgment against Crippen for a conversion.

The rules which apply to personal property after it has been put to any use in connection with land, are not uniformly agreed on, and any attempt to harmonize all the authorities would be idle. We must, in all these cases, adopt such conclusions as appear most in accordance with the general doctrines of the law.

At the common law, personal property, as a general rule, never lost its identity in realty, unless so closely incorporated with it that it could not be separated without injury to the freehold. And even under the peculiar preference given by the English law to trade over agricultural improvements, buildings erected for farming uses, although resting upon foundations of masonry, were not considered as real estate as against the tenant, if capable of being removed without injury. In Wansbrough v. Maton, 4 Ad. & El., 884, it was held expressly that a barn resting upon a masonry foundation, and capable of removal, was no part of the freehold, and was therefore, in all respects, the chattel of the tenant who built it. * * *

In regard to erections made by tenants for purposes of trade or manufacture, an exception was early raised in their favor, allowing them to remove erections made for those purposes, although actually annexed to the freehold in a substantial way. But, inasmuch as these erections had, during the tenancy, become actual parts of the freehold, it was usually necessary for the tenant to

remove them before restoring the possession to the landlord; as he could not afterwards enter upon and remove that which had become part of the land, although, during his possession, he was not liable for such waste as would arise by such removal of what he had himself erected. If, however, the estate of the tenant was indeterminate, the property in the improvements was not divested by the lapse of the tenancy, and they might be removed afterwards: Bennett v. Nichols, 12 Mich. R., 22; Ombony v. Jones, 19 N. Y., 234. * * *

There can be no dispute but that, in this country and in England, many cases have been decided (and we are not disposed to question their propriety), which hold that personal chattels, although severable without material injury to the freehold, may yet pass as realty if apparently suitable and actually designed to be permanently attached to the land. These cases are, many of them, founded upon the change of business, whereby motive power, which formerly depended on the freehold itself, by the improvement of water privileges, has now become dependent on steam engines, which are personal chattels. The doctrine that held all the machinery of a water mill to be fixtures was based upon the idea that it was all designed to obtain the beneficial use of the realty. This principle cannot strictly apply to steam machinery, where everything is really dependent on that which is in its nature personal; and it is not surprising that in seeking to apply old rules to new circumstances, courts should not have always been consistent. Mills and factories are generally set up as entireties for the purpose of grinding, sawing and manufacturing; and yet, according to the current of modern decisions, the ultimate purpose is disregarded; and while the steam engine, which is but an incident to the main purpose, and which is often removed and replaced without disturbing the rest, is presumed to be realty, the looms and other permanent machinery, for the accommodation of which the building was chiefly erected, are at the same time regarded as mere chattels. Such an arbitrary rule is unreasonable, and contrary to the general usage of business, and, if allowed to prevail over the actual agreements of parties, would work great injustice.

But we think that, with every few exceptions, the authorities agree that there is no inflexible rule on the subject, and that every presumption which might arise in the absence of an agreement may be defeated by the agreement. In Wood v. Hewett, 8 Q. B., 913, the whole doctrine is put upon an intelligible and sensible basis. In that case, a fender, or water gate, was built in masonry

upon the lands of a party, who removed it, and who was sued in trespass by the proprietor of a mill upon other lands, on the ground that it was his property. The defendant claimed that it was a part of his freehold. Lord Denman said: "The question is whether, because the fender in this case had been placed on the defendant's soil, it became his property as a necessary consequence of its position. I am of opinion that such a consequence never follows of necessity where the chattel is separable. * * *

"The decision in Mant v. Collins is so far an authority in point of law as it shows that, in a case of this kind, it is always open to inquiry how the article came to be in the place in which it is found, and what the parties intended as to its use; and the respective rights may be determined by the evidence on these points." * * * "The agreement from the nature of the thing decides nothing." Patterson J. said: "The question does not turn upon any general doctrine of law, but upon the evidence in the case. The general rule respecting annexations to the freehold is always open to variation by agreement of parties; and if a chattel of this kind is put up so that the owner can remove it, I do not see why it should necessarily become part of the freehold, or why it should not be removable when the owner thinks fit, if it appear to have been so agreed." The case of Mant v. Collins decided that a pew door was not of necessity a part of the inheritance. * * *

In Mott v. Palmer, 1 N. Y. Rep., 564, it was held that rails built into a fence, with the understanding that they might be removed, did not pass to the vendee, although purchasing and taking possession without notice. And many cases are cited to show that ownership of the soil by one is not incompatible with owneship of any erection upon it by another. In this case, also, the owner of the rails was allowed to recover against the purchaser of the land for converting them the year after he purchased. There seems to be no limitation concerning the kind of severable chattel which may be owned by one person upon another's land. * * *

The case of Ford v. Cobb, 20 N. Y., 344, in some of its principal features, resembles the case now before us. Salt kettles, and grates, and arch fronts were purchased to be set up in brick arches, and a chattel mortgage was given back reciting these facts, and was duly recorded. The land was then sold to a purchaser without notice. It was held that the kettles never became realty, and that the chattel mortgage title must prevail. The case of Godard v. Gould, 14 Barb. S. C. R., 662, was entirely similar in principle.

There are cases in some states, particularly in Massachusetts,

which are not consistent with these decisions. But when we consider the original common law doctrine, requiring an actual incorporation into the freehold, and the peculiar rules of policy which have since allowed articles which are personal in their nature to be annexed by construction, we think that rule is the safest which allows personalty to continue as such until changed by design into realty.

So long as a chattel may be removed as such from real estate, and is in a condition to be removed without material injury to the freehold, it is difficult to see by what process the title to it can be divested from its original owner, without some sale or transfer, or some acquiescence in the sale or transfer made by another, under circumstances going to create an estoppel. The cases in New York hold distinctly that the chattel does not cease to be a chattel, and does not, therefore, pass to a *bona fide* purchaser of the land. This is in accordance with the usual rule concerning separate chattels, a *bona fide* purchaser having no claim against the true owner. Whether this rule should be universal is not material in the case before us, for there has been no *bona fide* purchase, and therefore it is not necessary to express an opinion on it. The machinery was not put up when the original mortgage was given, and Crippen, when he first obtained his assignment from Morley, was informed there was no claim on the machinery. He could not divest himself of the force of this notice.

It is claimed, however, that, by the rules of law, fixtures made after a mortgage belong to the mortgagee, and that the mortgagor has not such an estate as will authorize any one to make an agreement with him touching the use of the land. Under the English rule, which gives the mortgagee an immediate right of possession, the mortgagor cannot give others a right he does not possess himself; and should he erect improvements which could not be severed without injury, they must undoubtedly continue on the premises. Improvements made by him would be presumed to be made for the benefit of the inheritance. But we think those cases which make this presumption absolute, not only as against him, but as against other owners of chattels placing them on the premises, go beyond reason, and divest property without any necessity or propriety, when its nature has not, in fact, been changed. * * *

The mortgagor, therefore, until actual foreclosure, is in possession by right, and not by sufferance, and may make such arrangements for the use of the property as any other person could during his term. The machinery never became any part of the realty;

Crippen was not misled by appearance and had no right to dispose of it. * * *

Judgment should be affirmed, with costs.

MARTIN, CH. J.—Whatever may be the rule of the common law, respecting fixtures, in the absence of any agreement of parties, it is well settled at this day that the contract of parties will fix the character and control the disposition of personal property, which, in the absence of a contract, would be held to be a fixture; in other words, the parties interested may control the legal effect of any transaction respecting such property by express agreement. Such was done in the case before us. The property which is the subject of this litigation was only erected upon the premises upon the agreement that it should be subject to a chattel mortgage for its purchase price. By this the parties kept it separate from the realty, and it never became part of it. * * * Crippen certainly never purchased it, for he bought with the full knowledge of the property, and the claims of the defendants in error to it. * * * His purchase at the sale barely confirmed his title to the land, as he acquired it by purchase of the decree—nothing more.

The Judgment of the court below is affirmed, with costs.[4]

CHRISTIANCY, J., did not sit in this case.

INTENTION.

STATE SECURITY BANK v. HOSKINS et al.

130 Iowa 339, 106 N. W. 764, 8 L. R. A. N. S. 376. 1906.

[This was an action in which the defendants appealed from a decree enjoining the removal of a gasoline engine from a farm owned by the plaintiff, which engine the defendants claimed under bill of sale.]

Further facts appear in the opinion.

MCCLAIN, C. J.—The question elaborately argued, and upon which extensive citations of authorities are made by counsel are: First, whether the gasoline engine in question, which was erected by plaintiff's remote grantor on the farm to which plaintiff acquired title by warranty deed covering "all the appurtenances," placed

[4] See Childs' Personal Property, § 10.

on a solid stone foundation, inclosed in a permanent building also resting on a stone foundation, and intended for use, and used to propel machinery for grinding feed for stock, was a part of the realty passing to plaintiff by the deed, as against the defendants, who by bill of sale, acquired from the same grantor "the following described property: Live stock, plows, etc. (specifically described), and all other machinery and tools and farm wagons on said premises." And, second, whether, conceding the gasoline engine in question to be a part of the realty as a matter of law in the absence of any agreement or understanding that it was to become personal property and pass to the defendants under the bill of sale, there is any evidence to show an agreement or understanding binding on the plaintiff that said engine should be personal property. Courts have found difficulty in many cases in determining whether chattels have been so annexed, actually or constructively, to the realty as to pass with it by a conveyance, but as to this engine, placed by the original grantor, Anderson, upon his stock farm for permanent use, we think there can be no difficulty whatever in determining its character. In holding an engine to be part of the realty this court has laid particular emphasis on the intention of the person making the annexation, and has said that the character of the physical attachment, whether slight, or otherwise, and the use are mainly important in determining the intention of the party making the annexation. Ottumwa Woolen Mill Co. v. Hawley, 44 Iowa 57, 24 Am. Rep. 719. And in holding that platform scales placed on a foundation were part of the realty, we have said that the intention which controls, is not a secret purpose of the owner, but that which should be implied from his acts, and is ordinarily to be inferred from the nature of the article, the manner and object of its use, and the mode of its annexation. Thompson v. Smith, 111 Iowa, 718, 83 N. W. 789, 50 L. R. A. 780, 82 Am. St. Rep. 541. Applying the same tests, we have held that a furnace standing on a brick foundation in the cellar of a house, and connected with pipes and flues for the purpose of furnishing heat, and a boiler attached to pipes connecting it with the kitchen range, and intended to supply hot water to the rooms in the house, were part of the house, although they might have been removed without injury to it by severing their connections. West v. Farmers' Mut. Ins. Co., 117 Iowa, 147, 90 N. W. 523.

This engine could have been taken off its stone and cement foundation by unscrewing the burrs of the bolts by which it was fastened to the foundation, and might have been taken out of the

building constructed around it by cutting a hole in the wooden walls, but to so remove it would clearly have been contrary to the intention with which it was fastened to the foundation and inclosed in the building. The mere fact that such a piece of machinery can be removed from the support on which it rests even by its own weight alone does not, in itself, negative the intention to annex it permanently to the realty. Detroit United Railway Co. v. Board of State Tax. Com. (Mich.) 98 N. W. 997. Knickerbocker Trust Co. v. Penn Cordage Co. (N. J. Err. & App.), 58 Atl. 409. We are inclined to give greater weight to the intention of the party indicated by his acts in attaching chattels to the realty and using them in connection therewith, than to the manner of physical annexation. As is said in Gibson, C. J., in Voorhis v. Freeman, 2 Watts & S. 116, 37 Am. Dec. 490; "The simple criterion of physical attachment is so limited in its range and so productive of contradiction, even in regard to fixtures in dwellings to which it was adapted before England had become a manufacturing country, that it will answer for nothing else." And in support of the more liberal rule, see, also, Farrar v. Stackpole, 6 Me. 154, 19 Am. Dec. 201; Despatch Line v. Bellamy Mfg. Co., 12 N. H. 205, 37 Am. Dec. 203; Cavis v. Beckford, 62 N. H. 229, 13 Am. St. Rep. 554; Bullard v. Hopkins, (Iowa) 105 N. W. 197; 19 Cyc. 1045. We have not the slightest doubt that aside from any special agreement or understanding of which plaintiff had notice, this gasoline engine became the property of plaintiff under the conveyance to it. The cases relied on for appellant relate to trade fixtures or chattels annexed by one person to the land of another, as to which other considerations control. * * *

The decree of the trial court is affirmed.[5]

AGREEMENT.

TYSON et al. v. POST et al.

108 N. Y. 217, 15 N. E. 316, 2 Am. St. Rep. 409. 1888.

Action to foreclose purchase money mortgages.

[The premises in question consisted of land on which were situated the plant and machinery of two abandoned marine railways. The

[5] See Childs' Personal Property, § 12.

defendant, Post, claimed title to the machinery because of an oral agreement between all parties. Judgment for defendants and plaintiffs appealed.]

Further facts are stated in the opinion.

ANDREWS, J.—The question whether the defendant Post acquired title to the plant and machinery of the marine railways embraced in the plaintiffs' mortgage, as security for the $6,200 paid by him to the plaintiffs at the request of Carroll, to enable the latter to complete the first payment on the contract with the plaintiffs for the purchase of the land, does not depend upon the character of of the property, whether real or personal, when placed upon the mortgaged premises. There can be little doubt, however, that the machinery, shafting, rollers and other articles became as between vendor and vendee, and mortgagor and mortgagee, fixtures and a part of the realty. (McRae v. Central Nat. B'k. 66 N. Y. 489.) But, as by agreement, for the purpose of protecting the rights of vendors of personalty, or of creditors, chattels may retain their character as chattels, notwithsanding their annexation to the land in such a way as in the absence of an agreement would constitute them fixtures (Ford v. Cobb, 20 N. Y. 344; Sisson v. Hibbard, 75 id. 542), so, also, it would seem to follow, that by convention, the owner of land may reimpress the character of personalty on chattels, which, by annexation to the land, have become fixtures according to the ordinary rule of law, provided only that they have not been so incorporated as to lose their identity and the reconversion does not interfere with the rights of creditors or third persons. The plant and machinery in question were personal property when placed on the land, and the only issue presented is, did the plaintiffs agree with Post that he might take the title to the plant and machinery for his security, free of the mortgage, and remove them at any time from the mortgaged premises, thereby reimpressing the property with the character of personalty. In determining this question it does not seem to us to be very material to inquire whether the deed from the plaintiffs to Cooney (the nominee of Carroll), and the mortgage back embraced, or was intended to embrace, the plant and machinery. Post was not a party to the instruments and is not concluded by them. The rights of Post depend wholly upon his agreement with the plaintiffs, and if they received his money upon the agreement that he should have the plant and machinery,

with the right to remove them without restriction as to time, the agreement was valid although by parol, and even if it contradicts the legal import of the mortgage, it being an agreement between different parties, it is not within the rule which forbids parol evidence to contradict a written instrument. The only point of disagreement between the parties relates to a restriction alleged to have been placed on the time within which Post should exercise the right of removal. The plaintiffs concede that the right of removal was given to Post, but they allege that it was subject to the limitation that the right should be exercised before any proceedings were taken to foreclose the mortgage. The defendant on the other hand claims that the right was unrestricted and absolute. The paper executed by the plaintiffs on the closing of the transaction contains the restriction claimed by the plaintiffs. But we think the evidence sustains the contention of the defendant, that the paper was not delivered to or accepted by him, and that he had no knowledge of its contents. The question of fact, therefore, depends upon the other evidence bearing upon the actual agreement. It would not be useful to state the evidence in detail. It is sufficient to say that after a careful examination of the testimony, we have reached the conclusion that the claim of the defendant is most consistent with the conceded facts and is supported by a preponderance of evidence.

The orders of the General Term should, therefore, be affirmed, and judgments absolute directed in accordance with the stipulations.

All concur.

Judgments accordingly.[6]

ANNEXATION.

BRIGHAM v. OVERSTREET.

128 Ga. 447, 57 S. E. 484, 10 L. R. A. (N. S.) 452. 1907.

The facts as stated by the court are as follows:

FISH, C. J.—E. K. Overstreet brought an equitable action against Charles Brigham and C. F. Rackley. The substance of the petition was as follows: In August, 1905, Brigham sold and conveyed, by

[6] See Childs' Personal Property, §§ 12, 141.

warranty deed, certain described lands to the Southern States Phosphate & Fertilizer Company, which company subsequently rented the land to Brigham for the year 1906. In April, 1906, the company sold the premises to Overstreet and transferred to him the note given it by Brigham for the rent for 1906; possession of the lands being surrendered by the company to Overstreet, subject to the tenancy of Brigham for that year. Before Brigham sold to the fertilizer company, and while he was owner of the premises, he placed thereon a sugar cane house, sugar cane boiler, furnace and sugar cane mill; the boiler being placed in a brick furnace, which was on the ground and the chimney to which ran up through and above the roof of the sugar mill house, over the boiler and furnace, the mill being put up by placing four large substantial lightwood posts firmly in the ground, and being fastened securely to the posts by spikes driven through holes in the mill and into the posts. All of these were permanent and substantial fixtures, intended to remain on the premises. "Brigham further put down on said place, as a permanent fixture, an old, broken or cracked sugar cane boiler, same being put down in a large horse stable, under a building, which boiler was used as a watering place for stock, and from which he ran a gutter from the well of the lot on said premises, same being a substantial fixture put there by the said Charles Brigham, the then owner of said premises, with intention that it remain there; [and] while in possession of said property as the owner thereof said Charles Brigham erected thereon a storehouse, into which a number of shelves, such as are usually built in such buildings, were built, which shelves are attached and nailed to the building, and form part of the building; * * * at the same time [he] put in said store several large counters and tables and a very large meat box, which, though not attached and nailed to the floor, are very cumbersome and too large to be removed conveniently, and were put there by the said Charles Brigham for the purpose of being allowed to remain there as permanent fixtures." In the deed to the premises from Brigham to the phosphate and fertilizer company none of these fixtures was reserved, and all were passed to petitioner under the sale of the premises to him by such company. There is a quantity of manure and compost in the stables, sheds, and lots on the premises made during the year 1906 from straw and manure from the stock. Brigham pretends to have sold all of said fixtures to Rackley, and they are threatening and are, without authority, about to remove the same from the premises, and "the damage to petitioner, should the said Charles Brigham and the

said C. F. Rackley * * * be allowed to remove said manure and fixtures from said premises, will be irreparable and inestimable." Injunction was prayed against the defendants, restraining them from removing any of such "fixtures" from the premises. * * * The court granted an interlocutory injunction, and the defendant, Brigham, excepted.

FISH, C. J.—The court was authorized by the evidence to find that all of the various things involved in this controversy, except the manure, were placed upon the premises, in the manner described in the petition, by Brigham while he was the owner of the premises. Realty or real estate includes all lands and the buildings thereon, and all things permanently attached to either. Civil Code, § 3045. Anything intended to remain permanently in its place, though not actually attached to the land, such as a rail fence, is a part of the realty and passes with it. Id. § 3049. In Cunningham v. Cureton, 96 Ga. 489, 23 S. E. 420, it was held, in effect, that whatever is placed in a building to carry out the obvious purpose for which it was erected, or to permanently increase its value for such purposes, and not intended to be removed about from place to place, but to be permanently used with the building, becomes a part of the realty, although it may be removable without injury either to itself or the building. * * * "As between grantor and grantee the strict rule of the common law prevails, that, in the absence of an agreement to the contrary, all fixtures, whether actually or constructively annexed to the realty, pass by a conveyance of the freehold." Wolff v. Sampson, 123 Ga. 400, 51 S. E. 335. A tenant cannot remove permanent fixtures, or otherwise injure the rented property. Civil Code, § 3119. In view of the law which we have cited, as applied to the facts as the court was authorized, from the evidence to find them, we have no difficulty in holding that all the fixtures in question which were on the premises when Brigham sold the land to the Southern States Phosphate & Fertilizer Company passed under his conveyance of the land to that company, and from such company to Overstreet, and that Brigham, who was the tenant of Overstreet, had no right to remove them from the rented premises.

5. Nor did the tenant have a right to remove the manure. Manure made in the usual course of husbandry upon a farm is so attached to and connected with the realty that, in the absence of an express stipulation to the contrary, it becomes appurtenant to and is treated as a part of the realty. * * *

Our conclusion is that an injunction was properly granted in the present case. We have, of course, treated the case from the standpoint that the evidence was sufficient to establish the fact that the defendant placed all the fixtures upon the land while he was the owner thereof. There was practically no dispute as to this, except as to the new sugar cane boiler, which the defendant testified that he placed upon the premises after he became the tenant thereof, but which the plaintiff and another witness testified was placed there while the defendant was the owner of the land. If, upon the final trial, it should appear that the fixtures, or any of them, were placed upon the premises after the defendant ceased to be the owner and became a tenant, then other questions might arise which we do not deem it necessary to now consider. Of course, if the counters, etc., in the storehouse had been, in legal contemplation, severed from the realty by a separate sale of the same by Brigham to Mrs. Daniel while he was the owner of the premises, they became her personal property, and consequently did not pass under his subsequent sale of the land to the phosphate and fertilizer company, and if Mrs. M. L. Brigham purchased them from Mrs. Daniel, she would not be prevented from removing them by the injunction granted in this case against Brigham. As they are not Charles Brigham's property, he is not hurt by being enjoined from removing them from the premises.

Judgment affirmed. All the Justices concur.[7]

ADAPTATION.

ROGERS et al. v. CROW et al.

40 Mo. 91, 93 Am. Dec. 299. 1867.

The facts are stated in the opinion.

WAGNER, J.—This was an action commenced in the St. Louis Court of Common Pleas by the respondents to recover the value of certain property which they alleged to be personal chattels belonging to them, and unlawfully possessed and detained by the appellants. From the record it appears that respondents were vestrymen and trustees for St. Paul's Parish, a Protestant Epis-

[7] See Childs' Personal Property, §§ 13, 31.

copal church in the city of St. Louis, and that in their house of worship they placed an organ, gas fixtures, and other articles, for the convenient occupancy of the same. That being pecuniarily embarrassed they executed a deed of trust conveying the lot on which the house was built, together with all the buildings, erections, and improvements, to secure the payment of their indebtedness. The notes which the deed of trust was taken to secure not being paid, the trustees in the deed sold the premises to satisfy the same, and on the sale Derrick A. January became the purchaser of the property. January afterwards deeded and conveyed the property to appellants, who are now in possession thereof. On the trial, respondents dismissed their cause of complaint as to several of the articles enumerated in their petition, and the court found that others passed by the sale with the premises as part of the realty, but refused to declare that the gas fixtures and the organ were fixtures, and decided that they were personal property detachable from the real estate, and therefore did not pass with it.

The evidence shows that when the church was erected there was a niche or recess left in the walls over the vestibule, in the front end of the building, expressly for the reception of an organ; that the organ stands on a floor or platform built to receive it, and is fastened to this floor by nails driven through the outer case of the organ into the floor. In the rear of the organ the wall is in a rough, unfinished state, and is pretty much without ceiling or finish. If the organ were removed, it would not only destroy the architectural design, finish, and symmetry of the building, but would leave exposed to view the unfinished wall in the rear, and the open space above the organ which is now concealed by it. Skilful architects testified that they regarded the organ as a part of the church; the internal finish of the building, architecturally considered, would be incomplete without it.

If this contest had arisen between landlord and tenant, it would admit of little doubt; for as between landlord and tenant many things which pass under the general name of fixtures will for the encouragement of trade be permitted to be removed by the tenant during his term, which as between heir and executor, vendor and vendee, or mortgagor and mortgagee, would be considered as part and parcel of the realty, and would therefore belong to the heir, or vendee, or mortgagee.

As to the first point presented in the case, it has been uniformly held that lamps, chandeliers, candlesticks, candelabra, sconces, and the various contrivances for lighting houses by means of candles,

oil, or other fluids, are not fixtures, and form no part of the freehold.

In the case of Lawrence v. Kemp, 1 Duer, 363, the New York Superior Court decided that gas fixtures, when placed by a tenant in a shop or store, although fastened to the building, are not fixtures as between landlord and tenant.

In Wall v. Hinds, 4 Gray, 256, it was held that a lessee could take away gas pipes put by him into a house leased to him for a hotel, and passing from the cellar through the floors and partitions, and kept in place in the room by metal bands, though some of them passed through wooden ornaments of the ceiling, which were cut away for their removal.

In South Carolina a house and lot were sold under a foreclosure of mortgage, and a few days afterwards the sheriff, under execution against the mortgagor, removed and sold certain gas chandeliers and pendant hall gas burners, and the court decided unanimously that they were not fixtures which passed to the purchaser of the real estate by the conveyance of the land. Montague v. Dent, 10 Rich. 135.

The same question arose in Pennsylvania in the case of Vaughen v. Halderman, 9 Casey, 522, where porperty was sold by the sheriff in pursuance of an execution placed in his hands, and it was decided in the same way, the court holding that gas fixtures did not pass under the sale to the vendee as a part of the realty. In his opinion, Read, J., says: "The pipes connect with the street main, and are now carried up through the walls and ceilings of the house, with openings at the points where it is intended to attach fixtures for the purpose of lighting the rooms and entries. These are called gas fittings; whilst the chandeliers and other substitutes for the oil lamps and candles are called gas fixtures, and are screwed onto the pipes and cemented only to prevent the escape of gas; and may be removed at pleasure, without injury either to the fittings or to the freehold. There is therefore really nothing to distinguish this new apparatus from the old lamps, candlesticks and chandeliers, which have always been considered as personal property."

The next question, as to whether the organ is to be regarded as a fixture, is not entirely clear. Great diversity exists in the adjudications on this subject, and few decisions can be considered as absolute authorities in other instances, even of fixtures of a similar denomination. It will be found on an examination of the books, that considerations of custom, intention, ornament, convenience, and so forth, have all had influence in controlling the

cases. Whilst it has been held that chattels should not be regarded as fixtures, unless they are so far incorporated with the structure of which they form a part that they cannot be severed from it without injuring the structure itself, as in Farrar v. Chauffette, 5 Den. 527; yet the general course of decision is in favor of viewing everything as a fixture which has been attached to the realty, with a view to the purpose for which it is employed or held, however slight or temporary the connection between them. Walmsley v. Milne, 7 C. B. (N. S.) 115; Wilde v. Waters, 16 C. B. 637. In accordance with this rule, it has been held repeatedly that the machinery of a manufactory is to be regarded as a part of the realty, whether it is attached to the body of the building or merely connected with the other machinery by running bands or gearing which may be thrown off at pleasure and without injury to the freehold. In general, it may be said that as between vendor and vendee the purchaser is clearly entitled to everything that has been annexed to the freehold with a view of increasing its value or adapting it to the purposes for which it is used; and within this principle it has been held that pipes and bath tubs of a dwelling, the counters of a store, the vats, stills, and kettles of a brewery or distillery, are fixtures. Cohen v. Kyler, 27 Mo. 122; Tabor v. Robinson, 36 Barb. 485; Man v. Schwarzwalder, 4 E. D. Smith, 273; Bryan v. Lawrence, 5 Jones, 337.

Mr. Dane, in his Abridgement of American Law, remarks, "It is very difficult to extract from all the cases as to fixtures, in the books, any one principle upon which they have been decided; though being fixed and fastened to the soil, house, or freehold, seems to have been the leading one in some cases, though not the only one." And he further remarks, "not the mere fixing or fastening is alone to be regarded, but the use, nature and intention." 3 Dane's Abr. 156.

In Teaf v. Hewitt et al., 1 Ohio St. 511, Ch. J. Bartley, after a very able review of the authorities, reached the conclusion, that the united application of the following requisites might be considered the safest criterion of a fixture: "1. Actual annexation to the realty or something appurtenant thereto. 2. Application to the use and purpose of that part of the realty with which it is connected. 3. The intention of the party making the annexation to make the article a permanent accession to the freehold; this intention being inferred from the nature of the article affixed, the relation and situation of the party making the annexation, the

structure and mode of annexation, and the purpose and use for which the annexation has been made."

In the building of the church, a space or recess was purposely left to be exclusively appropriated to the reception of an organ; that part of the building was left incomplete, and was never finished till the organ was put in position. This was necessary to give that part of the house perfection, symmetry, and make it conform to the intention and uses had in view when it was erected. Architecturally it was incomplete till the organ was fitted and fastened and the workmen closed their labors, hiding the unfinished walls in the rear. The character or permanency of the annexation in this particular case can have no controlling or preponderating weight. Upon an examination of the design, use and adaptability, the evidence of intention was manifest and unmistakable, and the purchaser had a right to be governed by these considerations in regarding it as a fixture. In the execution of the deed of trust the grantors made no reservation, and it must be presumed that they intended everything should pass by their deed that was annexed to the realty and stand pledged as a security for the debt. Under all the circumstances, we are of the opinion that the organ was a fixture and formed parcel of the realty, and as such is rightfully the property of the grantees.

The judgment must be reversed and the cause remanded. The other judges concur.[8]

LANDLORD AND TENANT.

Right of Tenant to Remove Fixtures—Tenancy Certain—Termination by Act of Tenant.

FREE v. STUART et al.

39 Neb. 220, 57 N. W. 991. 1894.

The facts are stated in the opinion.

NORVAL, C. J.—This action was brought in the court below by appellee, M. E. Free, to foreclose a chattel mortgage given by the defendants Stuart & Schemensky on two greenhouses erected by

[8] See Childs' Personal Property, § 15.

them on leased real estate owned by appellants, George W. Sautter and Frank Sautter. The cause was tried by the district court upon a written agreed statement of facts, signed by the attorney of the respective parties, of which the following is a copy: "(1) In the spring of 1888 the said Geo. W. and Frank Sautter were the owners in fee of a certain dwelling house, without outbuildings and about ten acres of land surrounding, in the outskirts of the city of Omaha, and within the limits of said city. That at said time said Sautter brothers rented the house and outbuildings only from April 1, 1888, to March 1, 1889, to the defendant C. Schemensky, for $100.00. The rent for this term was paid. (2) At the end of of this term said Geo. W. and Frank Sautter rented the house, barn, orchard, vineyard, and all the land for one year for $200.00, the lease expiring March 1, 1890, and of this rent the tenant, Schemensky, paid $93.00, leaving a balance still unpaid of $107.00. (3) At the end of this term, on March 3, 1890, said Geo. W. and Frank Sautter rented the same premises for another year to said Schemensky for $225.00, the lease expiring March 1, 1891. Of this rent there was paid $13.40. (4) At the end of the last term the tenant, Schemensky, held over until May 12, 1891, at which time the tenant quit the possession and occupation of the premises, leaving a total of rent unpaid amounting to the sum of $341.60, no part of which has yet been paid. (5) That in the spring of 1890 said Schemensky requested permission of said Geo. W. and Frank Sautter, owners of said premises, to erect thereon two buildings and a boiler house, and that the same were erected during the spring and early summer of 1890. They were erected by building the same out of planks and posts, with the use of glass and sash, as is usually the case in greenhouses, the said boards or planks being fastened to a number of upright posts that were inserted and fastened into the ground for a distance of about two feet below the surface. The framework was built around said posts. (6) That there was also constructed in said greenhouses a boiler for the purpose of heating the same, by building a brick foundation down into the ground, and building said brick up over and around said boiler, leaving it stationary, and pipes were attached to and ran from said boiler through the various portions of the house so constructed, and fastened to said greenhouse, in order thereby to conduct the heated water, and for the purpose of keeping the temperature in a condition required for greenhouses. The two buildings used as greenhouses were each 75 feet long and 10 feet wide, and were covered with glass and sash. They were con-

structed by nailing strips running from post to post, and onto those strips the planks for the sides and ends were nailed securely; and said houses and boiler are still remaining on said premises a when originally constructed. (7) On January 14, 1891, said Schemensky and one Stuart, who were partners as Stuart & Schemensky, executed to the plaintiff a chattel mortgage, a true copy of which is attached and made a part of plaintiff's petition, * * * and the amount now due thereon and unpaid by said mortgagors to the plaintiff is $182.40. (8) Said property was leased for the purpose of using the residence as a dwelling house, and the land for the purpose of gardening, raising flowers and shrubs, it having been used for this purpose for several years last past. At the time said houses were constructed, there was nothing said by the tenant about removing said greenhouses, boiler, and boiler house at the expiration of the lease or at any other time. (9) The plaintiff claims a lien on said houses and boiler by virtue of the foregoing chattel mortgage, and the defendants George W. and Frank Sautter claim them as fixtures to, and a part of, said land." The trial court found that Stuart & Schemensky executed and delivered to plaintiff the chattel mortgage described in the petition to secure an indebtedness of $163.84; that the buildings described in said mortgage were erected by the mortgagors upon leased premises, and were such fixtures as the tenants had a right to remove; and that said houses are subject to the said chattel mortgage. From a decree of foreclosure and sale the Sautters appeal to this court.

The point in dispute is, which party is entitled to the buildings covered by the mortgage? The mortgagee claims them by virtue of his mortgage, while the appellants insist that, as the improvements were erected by tenants on leased premises, they are a part of the realty, and neither the tenants nor the mortgagee had a right to remove them, at least after the expiration of the tenancy. * * * The decisions on the subject are at variance and irreconcilable. * * * For the purposes of this case we will assume that the buildings in controversy were trade fixtures, and were erected under such circumstances as to entitle the tenants to remove them had they exercised that right in time. The authorities are quite uniform to the effect that, in the absence of an agreement or understanding to the contrary, a tenant cannot re-enter, and remove his fixtures and improvements, after the expiration of his tenancy. By surrendering possession he forfeits his rights to them. The rule on the subject is well stated by Mr. Taylor in his valuable work on Landlord and Tenant, thus: "The decisions

also agree that whatever fixtures the tenant has a right to remove must be removed before his term expires, or at least before he quits possession; for, if the tenant leaves the premises without removing them, and the landlord takes possession, they become the property of the landlord. The tenant's right to remove is rather considered a privilege allowed him than an absolute right to the things themselves. If he does not exercise the privilege before his interest expires, he cannot do it afterwards, because the right to possess the land and the fixtures as a part of the realty vests immediately in the landlord; and, although the landlord has no right to complain, if the land be restored to him in the same plight it was before he made the lease, yet if the land is suffered to return to him with additions and improvements, even by forfeiture or notice to quit, he has a right to consider them as part of his property." And in the case of Friedlander v. Ryder, 30 Neb. 787, 47 N. W. 83, in considering the authority of a tenant to remove his fixtures, we said: "Under the lease, as established by the evidence, the tenant had a right, before the surrender of possession, to remove any improvements owned by him which are embraced under the head of tenant's fixtures, but the tenant had no authority to remove such improvements after the termination of the tenancy; in other words, the tenant could not re-enter to remove his fixtures after the surrender of his possession to the landlord." It appears from the stipulation that the lease under which the tenants occupied the premises expired on March 1, 1891, and that on the 12th day of May following they quit possession without removing the buildings which they had erected by permission of the owner of the realty. The record fails to disclose that there was any agreement or understanding between the parties about the removal of the improvements at the expiration of the lease or any other time. In view of these facts, there could be no doubt that the tenants have forfeited their right of removal.

Counsel for appellee contend that the tenancy had not expired when the tenants surrendered possession; that they were tenants from year to year; and although the lease terminated March 1, 1891, they having occupied the premises for several months after that time, the lease was thereby continued in force for another year, or until March, 1892. It is a familiar doctrine that where, in case of a tenancy from year to year, the tenant continues to occupy the property after the expiration of his lease by the consent of the landlord, it will be presumed, in the absence of an express agreement to the contrary, that the lease is extended for another

year; but we are unable to see how this rule can aid the appellee, since the tenants voluntarily abandoned possession, and it does not appear that either they or the landlord, after such abandonment, regarded the lease in force. The doctrine that the right of a tenant to remove his improvements must be exercised before the expiration of his lease applies alike to cases where the tenancy terminates by lapse of time, and to cases where it is determined by his own act. He may forfeit his right to remove his fixtures by voluntarily surrendering the possession to the landlord without reservation. It is quite probable, however, that such surrender would not affect the previously acquired rights of the tenants, vendees, or mortgagees. They should have the right to enter and remove the fixtures at any time before the lease would, by its terms, have expired. In the case at bar no attempt has been made to remove the buildings at any time. They were on the premises when the decree of foreclosure was entered, which was long after March 1, 1892, and it is not claimed that the tenancy continued after that date. Upon principle as well as authority we are constrained to hold that the mortgagees forfeited their right to the buildings by their failure to exercise it during the tenancy.

* * * Our conclusion is that the trial court erred in decreeing the foreclosure of the mortgage. The decree is therefore reversed, and the action dismissed. Judgment accordingly. The other judges concur.[9]

stop Sat Oct 9, 1920 ——— start Sat Oct 16.

TENANCY UNCERTAIN.

RAY v. YOUNG.

160 Iowa 613, 142 N. W. 393, 46 L. R. A. (N. S.) 947. 1913.

Bill in equity for an injunction to restrain the removal of a building. Decree for plaintiff and defendant appealed.

[Mrs. L. E. Ray owned a life estate in certain premises which she leased to the defendant, Young, for a period of one year, with the privilege of renewal for five years. At the time of making the lease, the defendant did not know that Mrs. Ray had only a life estate in the premises. On November 1, 1909, the defendant entered under a written lease for one year with the privilege of five, which

[9] See Childs' Personal Property §§ 18, 19.

lease contained a provision allowing the tenant to erect a building to be used as a garage and repair shop and to remove the same at the expiration of the lease. Young built the building and continued to live on the premises until June 8, 1911, when Mrs. Ray died. He had previously paid his rent up to January, 1912, having made an oral agreement with the plaintiff, a grandson of Mrs. Ray, to remain on the premises. Negotiations for a written lease were also entered into, but never consummated. On January 3, 1912, Young prepared to remove the building which he had erected, and was served with an injunction prohibiting such removal.]

EVANS, J.— * * * The equity of good conscience is not with the plaintiff in this case. If he is entitled to the decree awarded below, it must be upon the ground of absolute legal right unaffected by equitable considerations. The argument on behalf of the plaintiff is that he is not bound by the terms of the contract between the defendant and his lessor; that the rights of the defendant under his contract terminated with the death of such lessor; that the death of such lessor terminated not only the defendant's right of occupancy but his right of removal of the building; that the right of removal provided for by the terms of the lease could only be exercised during the term of the tenancy; and that at the death of the lessor the building passed to the remainderman as a part of the real estate. It is also contended that after the death of the lessor the defendant entered into a new oral lease with the plaintiff, and that he became thereby estopped from claiming ownership of the building. * * *

It must be conceded that the terms of the contract between the defendant and his lessor are not binding as such upon the plaintiff as remainderman. Stewart v. Matheny, 66 Miss. 21 (5 South. 387, 14 Am. St. Rep. 538); Jones v. Shufflin, 45 W. Va. 729 (31 S. E. 975, 72 Am. St. Rep. 848). This contract can be considered only as bearing upon the rights of the defendant as they were up to the time of the death of his lessor. It is the contention of the plaintiff that such contract cannot be considered for any purpose.

In view of such contention, we may as well inquire first whether, independent of the provision of the contract for the right of removal, the defendant had a right as between him and his lessor to remove the building erected by him. And this depends upon the further question whether or not the building should be classified as a trade fixture. * * *

Without dispute the building was built and used for garage and repair-shop purposes. * * *

There are occasional statements to be found to the effect that all annexations made by the tenant for the better enjoyment of the premises are removable by him, but these are not in accord with the weight of authority, which is substantially that the tenant's rights of removal are restricted to: (1) Trade fixtures; (2) domestic and ornamental fixtures; and by some decisions, (3) agricultural fixtures. * * *

Beyond question the building under consideration in this case was built by the defendant and used by him strictly for trade purposes within the meaning of the law on that subject. Regardless, therefore, of the particular provision in the defendant's contract with his lessor, he had a right to remove his buildings as between him and his lessor as a "trade fixture," provided, of course, that he could do so without substantial injury to the premises.

Taking such right as it then was immediately preceding the death of the lessor, the question is then projected whether his right of removal of his own property from the leased premises terminated instanter by the death of his lessor or whether he was entitled to a reasonable time to remove his property from the premises. There are cases which hold to the strict rule of forfeiture against the tenant in such a case. Stewart v. Matheny; Jones v. Shufflin, supra. We have never followed such a rule of forfeiture in this state; neither have we had occasion to pass upon the exact question now before us. The principle or theory upon which such rule is said to be based is that the fixtures erected by a tenant become a part of the realty as soon as erected, and that there is no right of property therein to the tenant, his right being in the nature of a privilege or license to sever the same from the realty and repossess himself thereof, and that a failure to exercise such right or privilege during the term of the tenancy is in legal effect a complete abandonment or "dereliction" to the landlord. This theory of the nature of the right of the tenant to fixtures erected by him has been repudiated in many jurisdictions, including our own, as will be hereinafter noted. The previous holdings of this court in that respect have been that the tenant has a right of property in the fixtures so erected by him, although he may lose his right of property on the theory of abandonment by the failure to make timely removal thereof. While such right remains, the property is deemed as the personal property of the tenant as between him and the landlord.

We think the weight of authority and reason is that the right of removal is not necessarily lost by the mere expiration of the term. An active duty devolves upon the tenant to exercise his right promptly, in view of all the circumstances of the case, and ordinarily he is required to exercise it before an actual surrender of the possession of the premises. But, as long as he continues in possession with the acquiescence of the owner, his right of removal continues accordingly. * * *

The following from Tiffany on Landlord and Tenant, Page 1585 et seq., is a sufficient résumé of the authorities on this question:

"A question has frequently arisen as to the time at which the right to remove trade, ornamental, or agricultural fixtures must be exercised, and it is difficult to extract a uniform rule from the decisions in this regard. In some decisions it is stated that the removal must be made during the term, in some that the right expires with the tenancy, and in some that it may be exercised a 'reasonable time' after the expiration of the term. * * *

"(b) Tenancy of uncertain duration. If the tenancy is of uncertain duration, such as a tenancy at will, or if it is subject to termination on a certain contingency, the tenant has a 'reasonable time' after its termination within which to remove the fixtures, provided at least the termination is not the result of his own voluntary act, and provided further, it seems, he has not relinquished possession. It has been questioned whether this principle would apply to a tenancy at will, when by statute the tenant is entitled to a reasonable notice to terminate, and there are cases somewhat adverse to its application in favor of a tenant under a lease made by a life tenant, when the leasehold is terminated by the death of the lessor."

We quote from Ewell on Fixtures, Page 293, the following:

"As has been already stated in a prior chapter, the general rule that the right of removal of fixtures must be exercised before the expiration of the tenancy is necessarily subject to exception in those cases where the tenancy is of uncertain duration and liable to be determined by the happening of some contingent or uncertain event on which it depends, as in the case of a tenancy at will. And in analogy to the case of tenancy at will, it seems that, to say the least, the right of personal representatives of a deceased tenant for life or in tail to remove the fixtures to which they are entitled is not terminated until after the expiration of a reasonable time after the death of the person whom they represent. Whether the right

of removal shall be considered to extend further than this, the authorities do not declare."

In the light of the foregoing we are disposed to follow the more equitable rule which allows the lessee of a tenant for life a reasonable time after the death of his lessor to surrender his possession and remove his property. This is not only equitable as between all the parties, but the contrary rule tends greatly to the unnecessary depreciation of the rental value of a life estate by the constant menace of forfeiture.

Was the defendant guilty of undue delay in the removal of his property in this case? This is largely a question of fact under the evidence in this record. No objection was ever made to his continued possession. On the contrary, in August, negotiations were entered into between the defendant and the plaintiff's guardian looking to a continuance of the tenancy. * * * On this branch of the case, therefore, we must find that defendant acted with reasonable promptness in the proposed removal of the building. * * *

We hardly need to say that in so removing it he was bound to do so without substantial injury to the premises and that he was bound to leave the property in as good condition as when he found it. * * *

It follows that the decree below must be reversed, the plaintiff's petition and the writ of injunction dismissed. * * *[10]

RENEWAL OF LEASE.

Right of Tenant to Remove Fixtures.

WATRISS v. FIRST NATIONAL BANK OF CAMBRIDGE.

124 Mass. 571, 26 Am. Rep. 694. 1878.

Trial was had before Ames J., who reported the facts and findings for consideration before the full court substantially as follows:

The plaintiff and one Hyde owned the premises as tenants in common, and by a lease dated January 1, 1861, demised them to the Harvard Bank for the term of five years, at a rental of $300 a year. The lease contained a clause giving to the lessee the privi-

[10] See Childs' Personal Property, § 20.

lege, at its option, of renewing and extending its enjoyment of the premises for the additional term of five years upon the same terms; and the lessee agreed "to quit and deliver up the premises to the lessors or their attorney, peaceably and quietly, at the end of the term, in as good order and condition, reasonable use and wearing thereof, fire and other unavoidable casualties excepted, as the same now are or may be put into by the said lessors." * * *

The lessee thereupon constructed in the building a fire-proof safe or vault, for the safe keeping of money, books and securities, also a portable furnace in the basement, with the necessary pipes, flues and registers for warming its rooms, and certain counters. The premises were occupied by the lessee as its banking rooms.

On May 16, 1864, the lessee was organized as a national bank under the laws of the United States, and its name was changed to the First National Bank of Cambridge, but there was no other change of its identity. In the course of the first term, a partition was duly had between Hyde and the plaintiff, by virtue of which the plaintiff became the sole owner of the premises. Before the expiration of the term, the defendant elected to continue to hold under the lease for the five additional years, and a new lease was executed between the parties to this action, bearing date October 7, 1870, granting to the defendant a further term of five years from January 1, 1871, at the rent of $800 a year. This lease contained the same clauses above quoted from the lease of January 1, 1861, and the following additional clause: "And provided also, that in case the premises, or any part therof, during said term, be destroyed or damaged by fire or other unavoidable casualty, so that the same shall be thereby rendered unfit for use and habitation, then, and in such case, the rent herein-before reserved, or a just and proportional part thereof, according to the nature and extent of the injuries sustained, shall be suspended or abated until the said premises shall have been put in proper condition for use and habitation by the said lessor, or these presents shall thereby be determined and ended, at the election of the said lessor or her legal representatives."

On or about November 5, 1875, the defendant, having concluded to remove its business to another building, proceeded to take down the vault, and remove the materials of which it was composed, and also the furnace, pipes, flues, registers, and counters to its new banking rooms, contending that it had a right so to do.

It was agreed that the damage done by this proceeding to the building, if the property so removed could lawfully be considered

as fixtures which the defendant, as an outgoing tenant, had a right to remove, was $75; that the plaintiff was entitled, at all events, to recover that sum, with interest, and that the building could for that sum be restored to the same good order and condition as it was in at the date of the first lease. The jury returned a verdict for the plaintiff for $75, and the judge reported the case for the consideration of the full court. If the plaintiff was entitled to recover a greater sum than the amount of the verdict, and if the alleged fixtures were removed wrongfully and in violation of her rights, the case was to stand for trial; otherwise, judgment was to be entered on the verdict.

ENDICOTT, J.—It is stated in the report that the Harvard Bank, soon after taking possession of the premises under the lease of January 1, 1861, put in a counter, a portable furnace with its necessary connections, and a fire-proof safe or vault, for the removal of which, in 1875, this action is brought. In 1864 the Harvard Bank was organized as the First National Bank of Cambridge. No question is made that all the proceedings were according to law. The right to the personal property of the old bank passed therefore to the defendant upon the execution of the necessary papers and the approval of the proper officers; no other assignment was necessary. Atlantic National Bank v. Harris, 118 Mass. 147, 151.

The right of the defendant to occupy the premises under the lease to the Harvard Bank for five years, and to exercise the option contained in the lease to hold the premises for five years more at the same rent, seems to have been conceded by the lessors; for the defendant continued in possession, paying rent during the whole term of ten years contemplated by the lease, which expired January 1, 1871. We must assume that the title, not merely to movable chattels upon the premises, but also to trade fixtures put in by the Harvard Bank, passed to the defendant, as the plaintiff does not deny that the defendant could have removed such of the articles as are trade fixtures at any time before the final expiration of the lease on January 1, 1871.

In October, 1870, about three months before the final expiration of the term of the old lease, the plaintiff, one of the original lessors, who had in the meantime acquired the whole title to the premises, executed a new lease to the defendant, then in occupation, for a much higher rent, containing different stipulations from those in the old lease, particularly in regard to abatement of rent in case of fire. This lease was to take effect January 1, 1871, but made

no reference to the existing lease or to the removal of any trade fixtures then upon the premises. It was in no proper sense a renewal of the old lease. It contained the usual covenants on the part of the lessee to quit and deliver up the premises at the end of the term in as good order and condition "as the same now are." Although executed before the expiration of the earlier lease, it can have no other or different effect than if given on the day it was to become operative, and its stipulations and conditions are to be considered as if made on that day. And the question arises whether the acceptance of the new lease and occupation under it on January 1, 1871, was equivalent to a surrender of the premises to the lessor at the expiration of the first term. If it did amount to a surrender, it is very clear that the defendant could not afterwards recover the articles alleged to be trade fixtures.

The general rule is well settled that trade fixtures become annexed to the real estate; but the tenant may remove them during his term, and, if he fails to do so, he cannot afterwards claim them against the owner of the land. Poole's case, 1 Salk. 368; Gaffield v. Hapgood, 17 Pick. 192; Winslow v. Merchants Ins. Co., 4 Met. 306, 311; Shepard v. Spaulding, 4 Met. 416; Baron Parke, in Minshall v. Lloyd, 2 M. & W. 450. This rule always applies when the term is of certain duration, as under a lease for a term of years, which contains no special provisions in regard to fixtures. But where the term is uncertain, or depends upon a contingency, as where a party is in as tenant for life, or at will, fixtures may be removed within a reasonable time after the tenancy is determined. Ellis v. Paige, 1 Pick. 43, 49; Doty v. Gorham, 5 Pick. 487, 490.

There is another class of cases which forms an exception to the general rule. Where a lease was given by an agent without sufficient authority during the absence of the owner, and was terminated by the owner on his return from abroad, it was decided by this court that the lessees became tenants at sufferance, and could remove their fixtures within a reasonable time after such termination. Antoni v. Belknap, 102 Mass. 193. In Penton v. Robart, 2 East, 88, it was held that a tenant, who had remained in possession after the expiration of the term, had the right to take away his fixtures, and Lord Kenyon said, "He was in fact still in possession of the premises at the time the things were taken away, and therefore there is no pretence to say that he had abandoned his right to them." In Weeton v. Woodcock, 7 M. & W. 14, a term under a lease had been forfeited by the bankruptcy of the

lessee, and the lessor entered upon the assignees to enforce the forfeiture, and it was held that they might have a reasonable time to remove fixtures; and Baron Alderson said that "the tenant's right to remove fixtures continues during his original term, and during such further period of possession by him, as he holds the premises under a right still to consider himself as tenant." * * * In Mackintosh v. Trotter, 3 M. & W. 184, Baron Parke, after stating that whatever is planted in the soil belongs to the soil, remarked "that the tenant has the right to remove fixtures of this nature during his term, or during what may, for his purpose, be considered as an excrescence on the term." He also refers to Minshall v. Lloyd, 2 M. & W. 450, as authority, wherein he stated in the most emphatic manner that "the right of a tenant is only to remove during his term the fixtures he may have put up, and so to make them cease to be any longer fixtures." It is clear from these cases that the right of a tenant, in possession after the end of his term, to remove fixtures within a reasonable time, does not rest merely on the fact that he is in occupation, or has not evinced an intention to abandon, but because he is still, in contemplation of law, in occupation as tenant under the original lease, and, as Baron Parke says, under what may be considered an excrescence on the term, that is, as tenant at sufferance.

But a very different question is presented when the same tenant continues in possession under a new lease containing different terms and conditions, making no reference to the old lease, reserving no rights to the lessee in fixtures annexed during the previous term and not removed before its expiration, and containing the covenant to deliver up the premises at the end of the term in the same condition. This is not the extension of or holding over under an existing lease; it is the creation of a new tenancy. And it follows that whatever was a part of the freehold when the lessee accepted and began his occupation under the new lease must be delivered up at the end of the term, and cannot be severed on the ground that it was put in, as a trade fixture, under a previous lease which has expired. The failure of the lessee to exercise his right to remove during the former term, or to reserve it in his new contract, precludes him from denying the title of his landlord to the estate and the fixtures annexed which have become part of it. The occupation under the new lease is in effect a surrender of the premises to the landlord under the old.

This view is supported by the authorities. * * * In Thresher v. East London Waterworks, 2 B. & C. 608, it was held that a

lessee, who had erected fixtures for purposes of trade on the premises, and afterward took a new lease to commence at the expiration of the former one, which contained a covenant to repair, would be bound to repair the fixtures, unless strong circumstances were shown that they were not intended to pass under the general words of the second demise; and a doubt was expressed whether any circumstances, dehors the deed, can be alleged to show they were not intended to pass. The case of Shepard v. Spaulding, 4 Met. 416, touches the question. A lessee erected a building on the demised premises, which he had a right to remove, but surrendered his interest to the lessor without reservation; afterward he took another lease of the premises from the same lessor, but it was held that his right to remove did not revive. When the new lease was made, it was of the whole estate, including the building. This differs from the case at bar only in the fact that there was an interval between the surrender of the interest under the first lease and the granting of the second, when the lessor was in actual possession. But the acceptance of the new lease and occupation under it are equivalent to a surrender of the premises at the end of the term. In Loughtan v. Ross, 45 N. Y. 792, it was held that, if a tenant, having a right to remove fixtures erected by him on the demised premises, accepts a new lease of such premises, including the buildings, without reservation or mention of any claim to the buildings, and enters upon a new term thereunder, the right to removal is lost, notwithstanding his occupation has been continuous. See also Abell v. Williams, 3 Daly, 17; Merritt v. Judd, 14 Cal. 59; Jungerman v. Bovee, 19 Cal. 354; Elwes v. Maw, 3 East. 38; Taylor on Landlord & Tenant (5th ed.), Par. 552; 2 Smith's Lead. Cas. (7th Am. ed.) 228, 245, 257.

We are therefore of opinion that the defendant had no right during the second term to remove any trade fixtures placed there during the first. If any of the articles named were movable chattels, as the defendant contends, the plaintiff cannot recover for them; but if they were permanent or trade fixtures, the plaintiff may recover for their removal.

Case to stand for trial.[11]

[11] See Childs' Personal Property, § 19.

KERR et al., Adm'rs, v. KINGSBURY et al.

39 Mich. 150, 33 Am. Rep. 362. 1878.

The facts are stated in the opinion.

COOLEY, J.—The controversy in this case concerns certain buildings which are claimed by complainant under a real estate mortgage given March 13, 1874, by defendant Solomon O. Kingsbury to their testator. The defendant Lyon, on the other hand, claims them as tenant's fixtures under a lease of the lands mortgaged.

The facts appear to be that the defendant S. O. Kingsbury, on the 25th day of January, 1871, being then the owner of certain premises situated on Calder and Almy streets in the city of Grand Rapids, leased the Calder street lots for ten years from June 1, 1871, to John S. Long and Samuel P. Bennett, constituting the copartnership of Long & Bennett, who took possession and occupied the same for the purposes of a coal and wood yard. The lease contained a provision allowing the lessees thirty days on its termination for the removal of the buildings they might erect. June 1, 1872, a further lease of a portion of the Almy street lots was made by Kingsbury to Long & Bennett, to terminate at the same time with the other, and containing a similar provision respecting the removal of buildings.

In September, 1873, S. O. Kingsbury purchased of Long his interest in the copartnership of Long & Bennett, and assumed his place in the business, which was thereafter carried on in the name of Kingsbury & Bennett. In February, 1874, S. O. Kingsbury conveyed all the lots on the two streets to Gaius P. Kingsbury. This conveyance does not seem to have been understood by the parties as a transfer to G. P. Kingsbury of anything more than the fee subject to the leases, and the business of Kingsbury & Bennett went on as before. In March, 1874, the deed to G. P. Kingsbury in the mean time not having been recorded, S. O. Kingsbury gave to Henry A. Kerr, whom the complainants represent, the mortgage under which they claim. In January, 1876, G. P. Kingsbury gave to Kingsbury & Bennett a new lease of all the lots for five years and five months. This would make the lease terminate at the same time as the former leases, and upon the face of the transaction no reason appears for giving it, unless it was to obtain for the purposes of the business the copartnership was engaged in, the lots on Almy street which were not covered by the second lease.

The buildings the right to which is in dispute in this case, had all been put up as tenant's erections previous to the giving of the Kerr mortgage, and were occupied by the copartnership of Kingsbury & Bennett for the purposes of their business at that time. That firm subsequently became insolvent and made an assignment for the benefit of their creditors to the defendant Lyon, who undertook to remove the buildings as personalty. It is not disputed that, as between landlord and tenant, the buildings would in general have been removable, but it is insisted that under the facts of this case they are covered by the lien of the real estate mortgage.

1. In brief the claim on the part of the complainants that when Kingsbury & Bennett, in January, 1876, accepted from G. P. Kingsbury a new lease, they in contemplation of law surrendered the existing leases, and not having asserted and exercised a right to remove the erections made previously, they thereby abandoned them to their landlord, and could not assert or transfer to any one else the right to remove them afterwards. This is the principal question in the case.

The right of a tenant to remove the erections made by him in furtherance of the purpose for which the premises were leased, is conceded. The principle which permits it is one of public policy, and has its foundation in the interest which society has that every person shall be encouraged to make the most beneficial use of his property the circumstances will admit of. On the other hand, the requirement that the tenant shall remove during his term whatever he proposes to claim a right to remove at all, is based upon a corresponding rule of public policy, for the protection of the landlord, and which is that the tenant shall not be suffered, after he has surrendered the premises, to enter upon the possession of the landlord or of a succeeding tenant, to remove fixtures, which he might and ought to have taken away before. A regard for the succeeding interests is the only substantial reason for the rule which requires the tenant to remove his fixtures during the term: indeed, the law does not in strictness require of him that he shall remove them during the term, but only before he surrenders possession, and during the time that he has a right to regard himself as occupying in the character of tenant. Penton v. Robart, 2 East, 88; Weeton v. Woodcock, 7 M. & W., 14.

But why the right should be lost when the tenant, instead of surrendering possession, takes a renewal of his lease, is not very apparent. There is certainly no reason of public policy to sustain

such a doctrine; on the contrary, the reasons which saved to the tenant his right to the fixtures in the first place are equally influential to save to him on a renewal what was unquestionably his before. What could possibly be more absurd than a rule of law which should in effect say to the tenant who is about to obtain a renewal: "If you will be at the expense and trouble, and incur the loss, of removing your erections during the term, and of afterwards bringing them back again, they shall be yours; otherwise you will be deemed to abandon them to your landlord."

There are some authorities which lay down this doctrine. Merritt v. Judd, 14 Cal. 59, is directly in point. That case is decided in reliance upon previous decisions which do not appear to us to warrant it. Fitzherbert v. Shaw, 1 H. Bl. 258, was a case in which ejectment having been brought against the tenant, he entered into an agreement that judgment should be signed at a certain time with stay of execution for a period; and the decision that the tenant could not afterwards remove fixtures was based upon the agreement. Lyde v. Russell, 1 B. & Ad. 394, only asserts the general rule that where the tenant surrenders possession without removing his fixtures he loses his right. Thresher v. East London, 2 B. & C. 608, was decided upon the construction of a covenant contained in the new lease, by which the tenant undertook to repair the erections and buildings, and at the end of the term the premises so repaired, etc., *to leave and yield up*, etc. Shepard v. Spaulding, 4 Met. 416, has some apparent analogy to the present case, but it is only apparent. There the tenant surrendered to his landlord without removing the fixture in controversy, but undertook to assert the right under a lease made several years afterwards, and which he took when he was as much a stranger to the premises as if he had never occupied them. It is manifest that none of these cases affords any support to the conclusion in Merritt v. Judd. And we have been unable to discover in London v. Platt, 34 Conn. 517; Davis v. Moss, 38 Penn. St. 346, or Haflick v. Stober, 11 Ohio [N. S.], 482, to which our attention is called in this case, anything important to this discussion.

The case of Loughran v. Ross, 45 N. Y. 792, is in accord with the case in California. In that case Mr. Justice Allen, speaking for the majority of the court, says: "In reason and principle the acceptance of a lease of the premises, including the buildings, without any reservation of right, or mention of any claim to the buildings and fixtures, and occupation under the new letting, are equivalent to a surrender of the possession to the landloard at the

expiration of the first term. The tenant is in under a new tenancy, and not under the old; and the rights which existed under the former tenancy, and which were not claimed or exercised, are abandoned as effectually as if the tenant had actually removed from the premises, and after an interval of time, shorter or longer, had taken another lease and returned to the premises." This is perfectly true if the second lease includes the buildings; but unless it does so in terms or by necessary implication, it is begging the whole question to assume that the lease included the buildings as a part of the realty. In our opinion it ought not to be held to include them unless from the lease itself an understanding to that effect is plainly inferable.

In Davis v. Moss, 38 Penn. St. 346, 353, it is said by Mr. Justice Woodward that "if a tenant remain in possession after the expiration of his term, and perform all the conditions of the lease, it amounts to a renewal of the lease from year to year, and I take it he would be entitled to remove fixtures during the year." This in our opinion is perfectly reasonable, and it is as applicable to other tenancies as it is to those from year to year which are implied from mere permissive holding over.

We think the decree below was correct, and it must be affirmed with costs.

The other Justices concurred. [12]

VENDOR AND VENDEE.

OWINGS v. ESTES.

256 Ill. 553, 100 N. E. 205, 43 L. R. A. (N. S.) 675. 1912.

The facts are stated in the opinion.

HAND, J.—This was a bill in chancery filed by the appellant in the circuit court of Scott county to enjoin the appellee from removing from a building located upon certain real estate in Winchester, in said county, which the appellant had purchased at master's sale in a partition suit, certain showcases, showracks, and other articles which were attached to the interior of said building, and which had been used by the owner of said premises in con-

[12] See Childs' Personal Property, § 19.

nection with the manufacture and sale of harness for many years. An answer and replication were filed, and a hearing was had before the court upon oral testimony and testimony taken before the master, and a decree was entered dismissing the bill for want of equity. The complainant has prosecuted this appeal.

The record shows that Jesse Estes, the father of appellee, had been engaged in the manufacture and sale of harness in Winchester for more than 40 years prior to his death, which occurred in the year 1909. His harness shop burned down in the year 1898, and the next year he rebuilt on the same location a two-story brick building, 20x85 feet. * * * At the time the new building was erected Jesse Estes purchased in the city of St. Louis three showcases, which were delivered to him in Winchester, knocked down. One was 55 feet long, 6 feet wide, and 12 feet high, had three glass doors, was paneled, and had above the doors glass transoms, and was fitted up on the inside with hangers upon which to hang harness for show purposes, and was of sufficient size to permit customers to go on the inside, and pass from door to door, and out into the show and sales rooms. The case was placed against the west side of the front room, the wall of which constituted its back, the floor its bottom, and the ceiling its top. Its corner posts, which were made of 4-inch stuff, extended from the floor to the ceiling, and were nailed to the ceiling and floor with six or eight penny nails. The other two cases were of similar construction to the large case, and were 4 feet wide, 8 feet high, and from 15 to 18 feet in length, and each weighed approximately 700 pounds. These cases stood in the front room, against the east wall, and were used as places in which to show saddles, fine harness, and other articles kept in the store for sale. The cases were all surrounded at the bottom by a quarter round molding, which held them snugly to the floor. Neither of the three cases could be removed from the room, except by being taken apart. There were also two substantial racks, which were either spiked or bolted to the floor or walls, upon which to display blankets, halters, etc. There were also two hangers, made of iron, which were screwed into the ceiling joists. The cases, racks, and hangers are conceded to be of the value of $250, and could not be removed from the building without marring, more or less, the room in which they were located. It was averred in the bill that the appellee was insolvent. The tools and fixtures in the shop were appraised at $25, and were located in the rear room of the building. The tools and fixtures appraised were sold by the administratrix of

Jesse Estes to the appellee and his brother, and upon the death of the brother were sold to appellee by his administratrix. After the purchase of the premises by the appellant, and the tools and fixtures by the appellee, the appellee commenced to tear down and remove the cases, racks, and hangers from the building, and this bill was filed.

The sole question to be determined in this case is: Are said cases, racks, and hangers fixtures, and did the title thereto pass to the appellant, as real estate, at the master's sale? It is generally held that what is annexed to the land becomes a part of the land; but it is often said it is not always easy to determine what constitutes an annexation sufficient for such purpose. Mr. Justice Breese, in discussing that question in Arnold v. Crowder, 81 Ill. 56, on page 58, 25 Am. Rep. 260, said: "Perhaps the true rule is that articles not otherwise attached to the land than by their own weight are not to be considered as part of the land, unless the circumstances are such as to show that they were intended to be part of the land, the onus of showing they were so intended lying on those who assert that they have ceased to be chattels; and that, on the contrary, an article which is affixed to the land, even slightly, is to be considered as part of the land, unless the circumstances are such as to show that the article was intended all along to continue a chattel, the onus similarly lying on those who contend that it is a chattel." In Kelly v. Austin, 46 Ill. 156, 92 Am. Dec. 243, it was held articles attached to the soil will be considered as a part of the real estate, as between an executor and heir or a vendor and vendee, when, as between landlord and tenant, they would be considered as personal property; that is, that the rule as between executor and heir and vendor and vendee is much more strict than between landlord and tenant.

In Fifield v. Farmers' Nat. Bank, 148 Ill. 163, at page 169, 35 N. E. 802, at page 804 (39 Am. St. Rep. 166), the following rules taken from Ewell on Fixtures for determining what are to be regarded as fixtures, and which would, as between a mortgagor and mortgagee and vendor and vendee, pass as a part of the real estate, were adopted: First, real or constructive annexation of the thing in question to the realty; second, appropriation or adaptation to the use or purpose of that part of the realty with which it is connected; third, the intention of the party making the annexation to make it a permanent accession to the freehold, this intention being inferred from the nature of the article affixed, the relation and situation of the party making the annexation and the

policy of the law in relation thereto, the structure and mode of the annexation, and the purpose or use for which the annexation has been made." And in that case the further quotation from the same author was made with approval, where it was said: "Of these tests the clear tendency of modern authority seems to be to give pre-eminence to the question of intention to make the article a permanent accession to the freehold, and the others seem to derive their chief value as evidence of such intention." * * *

In the case at bar all of the articles sought to be removed from the building were attached, more or less securely, to the building, and they were all purchased or made for the particular use to which they were appropriated in the building, and were specially adapted to that use; and it is clear, we think, that it was the intention of Jesse Estes, at the time he attached the cases, racks, and hangers to his building, that they should permanently become a part of the building. Each of said articles was specially adapted to the use to which it was appropriated in the building. The party making the annexation owned the building, and used the articles in connection with the building for something like 10 years, and when he attached each of said articles to his building he obviously attached them with the intention that they should become a permanent part of the building, and, had he sold the premises without any reservation, they would have passed to his grantee, and the same rule applied when the premises were sold at the master's sale. * * *

We are of the opinion that the trial court erred in holding that appellee had the right to remove the three showcases and two racks and the two hangers from the building purchased by appellant at the master's sale. The decree of the circuit court will be reversed, and the cause will be remanded to that court, with directions to enter a decree in accordance with the prayer of the bill.

Reversed and remanded, with directions.[13]

RIGHTS OF THIRD PARTIES. 5

FULLER-WARREN CO. v. HARTER.

110 Wis. 80, 85 N. W. 698. 1901.

[This was an action for the wrongful conversion of personal property. In 1894 the plaintiff sold and delivered to Ann T.

[13] See Childs' Personal Property, § 23.

Shurts a Fuller & Warren hot-air furnace to be used in heating her dwelling house. The furnace was duly installed under a guarantee to heat the house to a specified degree, or, upon failure, the plaintiff company would, upon notification, remedy the condition or remove the furnace and refund any money paid thereon. The furnace failed to heat the house, whereupon Mrs. Shurts notified the company to that effect and refused to accept or pay for the furnace. The plaintiff company attempted to remedy the defect and, according to its contention, was successful. This Mrs. Shurts denied, and, after refusing to accept the furnace, offered to return it, whereupon the plaintiff company brought suit to recover the purchase price, and, to that end, to enforce a lien on the ground that the furnace had become a part of the realty to which it was attached. Judgment was rendered in favor of Mrs. Shurts. Before the furnace was installed there was a mortgage placed on the house. While the suit was pending against Mrs. Shurts, foreclosure proceedings were instituted under the mortgage and the defendant Harter became the purchaser and owner of the house. The plaintiff company now demanded the furnace from Harter and was refused, whereupon suit was brought and judgment rendered for the plaintiff. Defendant appealed.]

MARSHALL, J.—As between Mrs. Shurts and respondent, the heating plant is personal property, notwithstanding its physical annexation to the building it was designed to heat. The plant was not simply set up in Mrs. Shurts' building on trial. It was actually sold and delivered to her and placed in her building to remain there as an improvement thereof, subject to the guaranty of its efficiency. The parties were competent to preserve its character as personalty, between themselves. That does not admit of a question. Smith v. Waggoner, 50 Wis. 155, 6 N. W. 568; Fitzgerald v. Anderson, 81 Wis. 341, 51 N. W. 554; Keefe v. Furlong, 96 Wis. 219, 70 N. W. 1110. They accomplished that, though the relations of vendor and vendee between them were not severed by resorting to the contract in that regard, but by the use by Mrs. Shurts of her remedy for the breach of warranty.

Did the heating plant become a fixture as to the mortgagee? That is the important question. That there was an intent on the part of respondent and Mrs. Shurts that it should be incorporated into and made a part of the building, subject to the right of the former to reclaim the same in case of inability to make the apparatus do the work guaranteed, is unquestioned. As before indicated, the contract of sale contemplated physical annexation of

the plant to and incorporation of it with the building it was designed to heat as a permanent improvement thereof, reserving the right to remove it as a mere security against losing the property as well as the pay for it if it failed to satisfy the warranty. All the essentials to change the chattel character of the property to real estate were satisfied, viz.: physical annexation of one to the other, adaptation of the improvement to the use to which the realty was devoted, and intent of the person causing the annexation to make a permanent improvement of the freehold. Tyler, Fixt. 114; Gunderson v. Swarthout, 104 Wis. 186, 80 N. W. 465. The relations between the parties after the plant was set up were substantially the same as they would have been had respondent sold it under an agreement that the title thereto should not pass to the vendee till it was paid for, and if payment was not made respondent should have the right to remove it from the building, doing no more injury thereto than necessary. Counsel for appellant claim that personal property incorporated into mortgaged realty under such circumstances, and without the mortgagee being a party to the transaction, becomes a part of the mortgage security, and cite many authorities to support that view. Counsel for respondent claim that in such circumstances, where the accession can be severed from the realty without injury to the latter or to the value of the security for the mortgage debt as it stood before the improvement was made, the same character is impressed upon the accession as between the vendor and the mortgagee as between the vendor and the mortgagor; in other words, that it does not become real estate, and may be severed from the realty and removed without invading the rights of the mortgagee. The learned trial court so held and there is ample authority to support that view, to some of which counsel for respondent have referred us. The difficulty is that there are two well-defined doctrines on the subject, one being directly opposed to the other. In many jurisdictions the doctrine contended for by appellant's counsel prevails, and in many others that contended for by respondent's counsel prevails. The former view is maintained by the following of the numerous authorities that might be cited: Miller v. Walson, 71 Iowa, 610, 33 N. W. 128; Clary v. Owen, 15 Gray, 522; Pierce v. George, 108 Mass. 78; Paper Co. v. Servin, 130 Mass. 511; Bank v. Mason, 147 Mass. 500, 18 N. E. 406, 7 L. R. A. 350; Meagher v. Hayes, 152 Mass. 228, 25 N. E. 105; Engine Co. v. Davis, 5 Houst. 192; Hawkins v. Hersey, 86 Me. 394, 30 Atl. 14; McFadden v. Allen, 134 N. Y. 489, 32 N. E. 21, 19 L. R. A. 446. The latter view is as firmly maintained by the following of many authorities that might

be mentioned: Campbell v. Roddy, 44 N. J. Eq. 244, 14 Atl. 279; Binkley v. Forkner, 117 Ind. 185, 19 N. E. 753, 3 L. R. A. 33; Hill v. Sewald, 53 Pa. 271; Crippen v. Morrison, 13 Mich. 23, Belvin v. Paper Co., 123 N. C. 138, 31 S. E. 655; Society v. Weber, 16 Wash. 95, 47 Pac. 224, 38 L. R. A. 267; Insurance Co. v. George, 77 Minn. 319, 79 N. W. 1028, 1064.

In Clary v. Owen, supra, the Massachusetts court, speaking by Mr. Justice Hoar, said: "We think it is not in the power of the mortgagor, by any agreement made with a third person after the execution of the mortgage, to give to such person the right to hold anything to be attached to the freehold, which as between mortgagor and mortgagee would become a part of the realty." * * * In Hawkins v. Hersey, the supreme court of Maine, speaking by Mr. Justice Whitehouse, said: "When machinery is sold and placed in a building for the purpose of making it available as a manufactory and permanently increasing its value for occupation, an agreement between the seller and buyer that the title shall remain in the former until it is wholly paid for, will not bind or affect the mortgagee of the realty without notice, and such machinery will pass to the mortgagee as a part of the realty."

On the other hand, in Society v. Weber, supra, the supreme court of Washington said that material sold and used in the construction of a building located upon mortgaged real estate, under an agreement with the mortgagor that the seller shall retain the title to such material till paid for, with the right to remove the same in case of nonpayment, does not become a part of the building and realty so that the mortgage lien will attach thereto as against the seller, if such material can be removed from the building without injury thereto. Similar language was used by the Minnesota court in Insurance Co. v. George, supra. * * * Probably the leading case on the subject is Campbell v. Roddy, supra, where the two doctrines are discussed at great length.

The rule that a contract between a mortgagor of real estate and his vendor of chattels, to be and which are actually wrought into such real estate as an improvement thereof, will preserve the chattel character of the accession, does not militate against the mortgage attaching thereto as a part of the security if the mortgagee is not a party to such agreement, is referred, for its original support in this country, most generally to the supreme court of Massachusetts, and it is sometimes called the Massachusetts rule. If it applies to this case, the finding that it is practicable to remove the heating

plant from the appellant's building is immaterial, and the judgment appealed from is wrong.

It seems that this court adopted the so-called Massachusetts rule at a very early day, in Frankland v. Moulton, 5 Wis. 1, where the opinion was delivered by Chief Justice Whiton, citing Winslow v. Insurance Co., 4 Metc. 306, Corliss v. McLagin, 29 Me. 115, and Butler v. Page, 7 Metc. 40. The circumstances in the Frankland case were that machinery was sold to the owner of the real property while it was incumbered by an equitable mortgage, to be attached to such realty as an improvement thereof, the vendor of the machinery retaining a chattel mortgage interest therein to secure the payment of the purchase money. It was held that the chattel mortgage was wholly inoperative as against the holder of the equitable mortgage; that the agreement between the chattel mortgagee and mortgagor, preserving the chattel character of the machinery after it was physically attached to and had become an appropriate improvement of the building in which it was located, was effective only between the parties to such mortgage. In Manufacturing Co. v. Rundle, 78 Wis. 150, 47 N. W. 364, a chattel mortgage was taken, by the vendor of a heating plant set up in a building, to secure the purchase money of such plant, and it was held that the chattel mortgage was not effective to preserve the chattel character of the heating plant as against prior lien claims upon the property. The very opposite was held in Campbell v. Roddy, the leading New Jersey case to which we have referred, where several Massachusetts cases that have received the approval of this court were reviewed and rejected as unsound. Frankland v. Moulton, in principle, covers the whole subject under discussion. It does not appear ever to have been criticised here since it was decided, but has been repeatedly approved as stating the true rule. * * *

The judicial policy for this state having been established for nearly half a century, as indicated, it is considered that we are not permitted to question it now. The opposite doctrine may be the most equitable. It is probably supported by the greater weight of authority if that is to be determined by the number of decisions. Possibly it may be by the better reasoning, though the indications, it is believed, from a study of the numerous cases that have dealt with the subject in recent years, are that it has been losing rather than gaining ground. The tendency of courts is to fence it within as narrow limits as practicable. * * *

There appears to be no legitimate way open to us to decide other-

wise than the trial court adopted the wrong doctrine in reaching a conclusion in this case. * * * As soon as the accession to the realty took place, the mortgage lien attached thereto and could not thereafter be removed without either payment of the mortgage or the mortgagee's consent. The rule stated in Land Co. v. Becker, 96 Wis. 206, 71 N. W. 117, applies. * * *

The judgment is reversed and the cause remanded with directions to render judgment in defendant's favor for costs.[14]

ROLLING STOCK.

HOYLE et al. v. THE PLATTSBURGH & MONTREAL RY. CO.

54 N. Y. 314, 13 Am. Rep. 595. 1873.

This was an action to foreclose two mortgages against the Plattsburgh & Montreal Ry. Co.

The facts are stated in the opinion.

JOHNSON, C.—The first question necessarily to be decided in this case is, whether the rolling stock of a railroad is personal property, or whether it is to be deemed constructively annexed to the road upon which it runs, so as in law to be regarded as part of the realty. If it be determined that rolling stock retains its character of personal property, then the question arises whether a mortgage of a railroad and its equipment needs to be filed under the statute of 1833, requiring mortgages of personal property to be filed when the possession of the property is not immediately delivered to the mortgagee. (Laws of 1833, Chap. 279, P. 402.) The questions thus presented are not authoritatively determined in this State. The opinion of the Supreme Court has been given in four reported cases. The earliest was that of The Farmers' Loan and Trust Co. v. Hendrickson (25 Barb., 484), in which the judgment rendered in October, 1857, by Justices S. B. Strong, Eldredge and Davies, declared that as between mortgagees and judgment creditors the rolling stock was to be deemed fixtures, and consequently that such a mortgage did not need to be filed under the act of 1833. In this case the mortgage specified engines, tenders, cars, etc., as part of

[14] See Childs' Personal Property, § 23.

the property mortgaged, and the rights of the plaintiffs might have been sustained by holding either that the chattel mortgage law did not apply to railroad mortgages, or that engines and cars were fixtures. The court rejected the former ground and placed the decision on the position that the rolling stock was part of the realty.

In Stevens v. The Buffalo & N. Y. C. R. R. (31 Barb., 590), decided in September, 1858, Justices Greene, Grover, and Marvin held that rolling stock was personalty, and that a mortgage thereof was required to be filed under the act of 1833. Elaborate opinions were written in support of these conclusions, in which the Hendrickson case, before cited, and that of Coe v. Hart, in the United States Circuit Court, before Mr. Justice McLean, that of Corey v. The Pittsburgh & F. W. R. Co. and Mitchell v. Winslow (2 Story, 690) were examined with the result before mentioned.

In December, 1859, Mr. Justice Allen decided (Beardsley v. Ontario Bank, 31 Barb., 619) the mortgage was of the railroad, real estate, chattels and franchises of the corporation. It was held that the rolling stock was not covered by the mortgage, not being part of the realty. The last two decisions were acquiesced in; the first, the case of Hendrickson, was taken to the Court of Appeals in 1863, and resulted in an order for reargument, and subsequently the case was settled. The case now under consideration is reported in 47 Barb., 109, before Justice Sutherland, at Special Term in 1867. He held that rolling stock does not become part of the realty, and that it passed by the two mortgages in question, as specially named, and not as part of the realty. * * * At General Term the case came before Justices Ingraham, Sutherland and G. G. Barnard, and the decision appealed from was affirmed, Judge Ingraham giving the only opinion. After declaring himself not prepared to accede to the opinion at Special Term, that rolling stock is in all cases to be considered as personal property, he holds that the intent of the parties is evident that the rolling stock should pass as part of the realty, and that such a construction should be given to the transaction.

In respect to the legal methods of disposition, all property is distributed by law under the head either of real or personal; and in order effectually to be disposed of, the act of disposition must conform to the mode appropriate to the kind of property. In regard to realty, a conveyance by metes and bounds of a parcel of land carries with it everything which the law recognizes as part of the realty, whether it was originally personal in its nature or

not, as fully and completely as by the most minute enumeration and specification. It draws to itself and binds everything afterward made part of the land by any method of annexation or affixing which the law recognizes as effectual, whether actual or constructive in character. (Murdock v. Gifford, 18 N. Y., 30; Mott v. Palmer, 1 Comst., 564; Leroy v. Platt, 4 Paige. 77.)

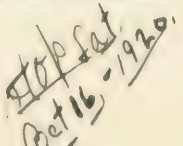
In view of these well settled and universally recognized rules, the cases—such as Prim v. Emery (32 N. Hamp., 484), and Pinnock v. Coe (23 How., 117), which, as well on grounds of reason as authority, labor to maintain that after-acquired rolling stock is bound by a previous mortgage, that in terms is declared to bind such after-acquired property—point irresistibly to the conviction that rolling stock is not part of the realty. No one ever doubted that a mortgage of land bound a house subsequently built upon it; nor that it bound anything originally personal which became afterward part of the land. The labored attempt to prove that rolling stock, acquired after the date of the mortgage, will be bound by it, shows how strongly the incongruity is perceived of treating it as part of the realty.

The general doctrine is, that things originally personal in their nature remain personal, though used in connection with land. All the implements of agriculture have their use only in the cultivation of land; and yet they are never thought to be part of the realty. Some element of annexation, usually physical in its character, is the common criterion for determining whether things personal in their origin have lost that quality and become part of the realty. Generally, the connection is appreciable by the senses; so that what belongs to the land and what is personal may be determined by the inspection alone. Cases of constructive annexation are few, and act upon peculiar and obvious reasons of their own. Looking now at the rolling stock of a railroad, it is originally personal in its character, it is subservient to a mere personal trade, the transportation of freight and passengers. The track exists for the use of the cars rather than the cars for the use of the track. There is no annexation, no immobility from weight, there is no localization in use. The only element on which an argument can be based to support the character of realty is adaptation to use, with and upon the track. Even in respect to this, were the same contrivance adopted by a tenant for use in his trade upon leased lands, his right to remove both cars and track would be beyond question. It is perhaps fortunate that this question was not finally adjudicated in the early days of railroad enterprise, for then unity

of ownership in track and cars and independence of roads upon each other seemed to render it possible to consider rolling stock part of the realty without introducing great inconvenience. At the present time independent companies exist, owning no tracks, whose trains run through State after State on the railroad track of other companies. It is no uncommon sight to see the cars of half a dozen companies formed into a single train and running from New York to Illinois and Missouri. It is impossible to deal with such property as part of the realty without introducing anomalies and uncertainties of the gravest character. * * * The difficulties which follow on admitting that rolling stock can be part of the realty are partly disclosed in Minnehaha Co. v. St. Paul Co. (2 Wall, 609.) * * * But upon examining the case it will be found that it was so decided by the District Court in another suit, the decree in which bound the parties then before the court, and concluded them that the question spoken of could not be adjudicated (P. 636). To this judgment thereof the justices dissent, and in expressing their views say, "We agree that the rolling stock upon this road covered by the several mortgages, and as respects any other valid liens upon the same, is inseparably connected with the road; in other words, is, in technical language, a fixture to the road, so far as in its nature and use it can be called a fixture." But it is a fixture extending over the entire track of the road. It is not a fixture upon any particular division or portion, but attaches to every part or portion.

While I can see that views like these are accommodated to railroads in the character of mortgagors in their relation with the holders of their bonds, they cannot be allowed to prevail without introducing inextricable confusion and uncertainty in respect to the laws of taxation and of judgment liens, and great embarrassment in dealing in respect to this class of property. It is vastly better that changes of this sort, if thought to be needed, should be introduced by legislation. In my judgment, the want of the element of localization in use is a controlling and conclusive reason why the character of realty should not be given to rolling stock of a railroad. For want of that element, rolling stock cannot be subjected to the laws regulating taxation and liens on real property.[15]

[15] See Williams v. The New Jersey Southern Ry. Co., 28 N. Jer. Eq. 277 (1877), where it is argued that rolling stock is realty. See same case, 29 N. Jer. Eq. 311 (1878), where it is decided that rolling stock is personalty.



EMBLEMENTS—NATURE OF.

BAGLEY v. COLUMBUS SOUTHERN RY. CO.

98 Ga. 626, 25 S. E. 638, 34 L. R. A. 286. 1896.

The facts are stated in the opinion.

SIMMONS, C. J.—1. Under the constitution of 1877, the jurisdiction of a justice's court over actions arising ex delicto is confined to "cases of injuries or damages to personal property." * * * It follows that a justice's court has no jurisdiction of a case in which the plaintiff seeks to recover damages for an injury to realty caused by the wrongful act of the defendant.

In the present case, which was commenced in a justice's court, the plaintiff alleged that the defendant railway company "did carelessly set fire to and destroy and burn a certain cow pasture, and about 300 yards of fencing, and about one-half acre of cotton growing in the field, the property of complainant, and all of the value of $25." Whether the magistrate had jurisdiction to entertain the suit must depend, therefore, upon whether the property alleged to have been thus destroyed is legally to be considered and characterized as personalty or as realty.

The burning of the plaintiff's "cow pasture" can scarcely be regarded as anything less than an injury to realty. Indeed, to characterize such an injury merely as damage to personalty would appear to be a euphemism unwarranted under the strict rules of law. If the plaintiff really intended to aver that the grass or other natural herbage growing upon his pasture lands was destroyed by fire, still such damage is to be legally considered as an injury to realty. "Growing crops, if fructus naturales, are part of the soil before severance." 4 Am. & Eng. Enc. Law, 894. "It is generally held that growing trees, fruit, and grass are parcel of the land." Tyler, Fixt. 735. As we shall hereinafter more fully discuss the nature of growing crops and their legal status, we may dismiss for the present further consideration of the plaintiff's claim of injury to his pasture, and pass to a discussion of the character of the damage he sustained by reason of the burning of his fences.

"A fence is generally considered to be a part of the realty." 7 Am. & Eng. Enc. Law, 905, 906, citing cases. And, to the same effect, see Tyler, Fixt. 116, 132, 133. Certainly, where the owner

of land builds or maintains thereon a substantial fence, as a permanent structure, constituting an improvement of the premises, such fence becomes as much an integral part of the realty as would a house or brick wall erected thereon. * * * So, the burning of the plaintiff's fences is likewise to be regarded as damage to realty.

Our main difficulty in disposing of the question of jurisdiction raised in this case has been to properly determine the legal character of the third item of damage claimed by the plaintiff, arising out of the destruction of unmatured cotton growing in his field. Many of the modern text-books and numerous adjudicated cases have been adverted to during the course of our investigation, but with a result tending rather to confusion than practical aid, so far as concerns a correct determination of the question whether, at common law, growing crops were characterized as personal or as real property. For instance, Mr. Freeman says: "Crops, whether growing or standing in the field ready to be harvested, are, when produced by annual cultivation, no part of the realty." 1 Freem. Ex'ns, § 113. And, in support of his text, he cites cases to show that unmatured crops are "liable to voluntary transfer as chattels," "may be seized and sold under execution," and pass "to the executor or administrator of the occupier [of the land], if he die before he has actually cut, reaped, or gathered the same." On the other hand, it is broadly stated in the American & English Encyclopedia of Law (volume 4, p. 887) that "growing crops, before maturity, and unsevered from the soil, are part and parcel of the land on which they grow, and pass with a conveyance of the land." Cases almost innumerable are cited as showing that this rule obtains in nearly every state in the Union. This text is then immediately followed by the statement (page 891) that "crops ripe for harvest are personal property. They pass to the executor, and not to the heir. They are liable to be seized on execution, and the officer may enter, cut down, seize, and sell the same as other personal estate." On the succeeding page it is said: "Although growing crops are part of the realty, unless severed from the soil, yet, for the purpose of levy and sale on execution, they are suffered to be treated as personalty." Again, we find it stated in 6 Lawson, Rights, Rem. & Prac. § 2681, that "crops, until they are gathered, are things immovable, or real estate, because they are attached to the ground;" but, when "crops are gathered, they become movable or chattels personal, because they are no longer attached to the soil. * * * Corn, ripe, but standing uncut in the field, passes by deed of the

freehold. Unharvested crops go to the devisee of the land, and not to the executor; but, as against the heirs at law, they go to the executor." This statement is met by the assertion to be found in 3 Ballard, Real Prop. § 128, that "annual crops sown by the owner of the soil or by his tenant, and which are the produce of industry and care while growing and immatured, are personal property;" whereas in the first volume of the same work (section 111) it is said that, "as a general rule, growing crops, which have been planted by the owner of the soil, constitute a part of the realty; but this rule is held not to apply to crops which have matured and are ready to be harvested." Mr. Kerr says: "Growing crops planted by the owner of the soil are a part of the realty, and, as a general rule, will pass with it on conveyance. * * * And this seems to be the case even though the crops are at the time standing in the field unharvested, although ripe, and the season for gathering them is long past. * * * It is the general rule that a crop growing on land at the time of a sale under execution passes to the purchaser; and the same is true on a sale under a mortgage foreclosure. * * * And growing crops are a part of the realty as between the successful plaintiff in an action of ejectment and the evicted defendant, where the crops were planted after the commencement of the action in ejectment. But the rule is otherwise where the grain was sown and harvested by one on lands to which he claimed title, and of which he was in actual possession. Crops planted by a tenant who holds under the owner of the soil are, as between the landlord and his tenant, personal property; and the tenant has the right to remove them. They become part of the realty, however, should the tenant voluntarily abandon or forfeit possession of the premises." 1 Kerr, Real Prop. §§ 50, 51. * * * In Preston v. Ryan, 45 Mich. 174, 7 N. W. 820, Justice Cooley said: "While it is quite true that the growing crops are a part of the realty, yet, for the purposes of levy and sale on execution, they are suffered to be treated as personalty." And there are numerous cases in which it has been held that where the owner of crops has undertaken to sell the same at private sale, before they matured, or while ripe, though ungathered, such crops, if grain or other agricultural produce raised annually, are to be treated as personalty for the purposes of such sale. The question as to whether such crops were personalty or realty arose in considering the effect of the statute of frauds upon sales of this character. These decisions were confined, however, to sales of such crops only as were termed "emblements" at common law. Clark,

Cont. 106. Says Mr. Kerr, in dealing with this subject: "A distinction is to be observed between 'fructus naturales,' or the natural growths of the soil, such as trees, grasses, herbs, fruit on trees and the like, which at common law are part of the soil, and 'fructus industriales,' or fruits or products the result of the annual labor of man in sowing and reaping, planting and gathering, which, though strictly a part of the realty, as much as those products which the soil brings forth without man's intervention, are treated as personal property for many purposes." 1 Kerr, Real Prop. § 50. * * *

Any one wishing to further entangle himself in the mystic maze of uncertainty and contradiction in which the law governing growing crops has become involved may profitably direct his attention to the legion of cases cited by the various text writers to whom we have above referred. * * * Indeed, we are free to confess that about the only deduction we have been able to draw therefrom is that a growing crop is a sort of legal species of chameleon, constantly changing color to meet the emergency of each peculiar class of cases in which the question arises whether it is to be considered as personalty or as realty. * * *

We may at the outset remark that, in our opinion, growing crops, before actual severance from the soil, were consistently regarded at common law as realty. Whatever incongruities may have crept into the law upon the subject as now understood in many jurisdictions we believe attributable alone to a misconception on the part of courts of the present day of the rules which governed this species of property under the feudal system prevailing in England at an early period of its history. * * * Blackstone tells us that in feudal times, when a common recovery suffered by the tenant of the freehold had the effect of annihilating all leases for years then subsisting, estates for years were necessarily of a precarious nature, and of short duration. 2 Bl. Comm. 143. The hardship attending a thus sudden termination of the lessee's estate before he could reap the fruits of his toil, by gathering his crops, appealed strongly for his protection. Relief was justly afforded by the courts upon the doctrine of emblements, designed to meet an emergency thus occasioned, whereby the tenant for years was given a right to gather that which he had in good faith planted. Not so, however, if a tenant whose term was certain sowed a crop he could not reasonably expect to be able to harvest before his term expired, or by his own act terminated his estate before his crops were matured and gathered,—in the one case, because "it was his

own folly to sow what he could never reap the profits of;" and, in the other case, because his estate terminated by reason of his own default or caprice. 2 Bl. Comm. 145. * * * The doctrine of emblements is based, and proceeds solely, on the idea that the tenant is justly entitled to gather his crops, even though his term has expired, and without regard to whether such crops are to be considered as in the nature of personalty or realty. Nor is the fact that at common law the executor of a deceased tenant was entitled to claim emblements any test as to the legal character of such crops while yet standing in the field. Here we disagree with the conclusion drawn by Mr. Freeman and other writers. Formerly, under the common-law rules of succession, the title to crops unsevered from the soil could not pass into the executor. Under the doctrine of emblements, however, he was given the right to enter upon the land, in the name of the deceased tenant, and convert the crops into personalty, by gathering the same and carrying them away, whereby the rules of succession governing personalty were given opportunity to ultimately take effect upon this species of property. * * * In fact, the doctrine of emblements was designed for the very purpose of effecting such a separation, and declaring emblements "distinct" from the "real estate in the land," no matter in whom such estate vested by reason of the sudden expiration of the tenant's term. It will be noted that Blackstone does not say that growing crops are distinct from the land upon which they are grown, but only that they are so after they become "emblements." Of course, where the doctrine of emblements has no application, growing crops cannot be considered as "emblements" at all. As, for instance, when, at the present day, the owner of lands in fee simple has an unqualified and exclusive interest therein, himself plants the crops, and remains in undisturbed possession of the premises, no such distinction between the land and unharvested crops growing thereon is properly to be observed. Thus, it is the almost universal rule in this country that where such owner voluntarily sells his lands, without expressly reserving a right to enter and gather growing crops planted thereon, such crops are to be regarded as realty, and, as such, pass to the purchaser. See the collection of cases cited in 4 Am. & Eng. Enc. Law, 887.

It will further be observed that Blackstone seems very studiously to avoid characterizing even "emblements" as personalty, but very happily, we think, remarks, instead, that they are "subject to many, though not all, the incidents attending personal chattels."

And herein we believe he has struck the keynote explaining how, in later times, growing crops have come to be considered personalty, simply because, the law having placed upon them many incidents common alike to chattels, no reason ordinarily exists for observing their true status as realty; and therefore the distinction which really still survives between them and mere chattels has not been clearly and consistently kept in view. * * *

We cannot refrain from remarking the embarrassment we have experienced arising out of the practice, which seems to have sprung up in some jurisdictions, of arbitrarily regarding growing crops as personalty for one purpose, and as realty for another. In the very nature of things, this species of property, being tangible in form, and possessing many marked inherent characteristics, is capable of being properly classified, and should be given a fixed legal status. * * * The justice of this critical observation is evidenced by the utter confusion in which we find the law upon the subject with which we are now dealing to be involved.

That growing crops cannot properly be "treated" as personalty under the law as understood in this state seems indisputable, in view of the definition of "realty" contained in section 2218 of the Code, which purports to be declaratory of the common law, and which reads as follows: "Realty, or real estate, includes all lands and the buildings thereon, and all things permanently attached to either, or any interest therein or issuing out of, or dependent thereon." Following this definition, it was held in Coody v. Lumber Co. 82 Ga. 793, 10 S. E. 220, that "trees growing upon land constitute part of the realty; and a sale of them, under the statute of frauds, must be in writing." And in Frost v. Render, 65 Ga. 15, wherein it appeared that a sheriff sold, under execution, land upon which was growing a crop of cotton, it was held that, "a levy being on certain land as the property of the defendant in fi. fa., a sale under such levy carries with it the crop growing on the land, and the sheriff cannot limit the sale by an announcement that the rent of the current year is reserved;" for the reason that the law considers growing crops part and parcel of the land itself, following its ownership as a mere element of value incident thereto. This is certainly the general rule which obtains in this state, and we know of no exceptions thereto which have gained any foothold in our law on the subject. * * * That the proper result in this particular case has been reached we are entirely convinced, and cannot regard as even debatable. The plaintiff was the owner, not only of the crop destroyed, but also of the land upon which it

was growing. His crop, therefore, cannot possibly fall within the term "emblements," nor properly be considered as even constructively constituting a species of property distinct from the land upon which it was growing at the time it was destroyed by fire.

Our conclusion, therefore, is that the justice's court had no jurisdiction to entertain the plaintiff's action. * * * After deliberate reflection, and after a most painstaking investigation of the law, we are constrained to hold that the recovery of six dollars, which the plaintiff obtained in the magistrate's court, cannot legally be upheld.

Judgment affirmed.

ATKINSON, J., providentially absent, and not presiding.[16]

FRUCTUS NATURALES.

In re CHAMBERLAIN.

140 N. Y. 390, 35 N. E. 602. 1893.

The facts are stated in the opinion.

ANDREWS, C. J.—We think the surrogate erred in charging the executrix with the sum of $173.29, the amount received by her for hay grown upon the farm in 1889. The testator died in June of that year, and the tenant of the farm, who worked it upon shares, cut the grass thereafter, and paid over to the executrix that sum as her share of the proceeds of the hay under the agreement with the testator. The executrix was devisee for life of the farm. Growing grass partakes of the nature of realty. Neither at common law nor under our statute does it go as assets to the executor or administrator, but follows the land, and belongs to the heir or devisee. Evans v. Roberts, 5 Barn. & C. 829; Kain v. Fisher, 6 N. Y. 597; 2 Rev. St. p. 82, § 6, subd. 6. On the other hand, corn and other annual crops produced by care and cultivation, and not growing spontaneously, are at common law, as between heir and executor or administrator, treated as chattels, and under our statute are assets for the payment of debts, even as against the devisee. 1 Williams, Ex'rs, p. 70; 2 Rev. St. p. 82, § 6, subd. 5;

[16] See Childs' Personal Property, §§ 27, 28.

Stall v. Wilbur, 77 N. Y. 158. It must be assumed, in the absence of evidence, that the executrix took the proceeds of the hay in the character of life tenant, and not as executrix. There was no change in the legal character of the grass by any act or contract of the testator in his lifetime. His share in the proceeds of the grass was in the nature of rent reserved, which accrued after the testator's death. The decree should therefore be modified by deducting from the amount charged against the executrix the sum of $173.29, and any interest which may have been allowed thereon.

The judgment below should be modified in conformity with this opinion, and as modified affirmed, without costs to either party. All concur. Judgment accordingly.[17]

WHO ENTITLED TO EMBLEMENTS.

Grantor and Grantee. 3

TRIPP v. HASCEIG.

20 Mich. 254. 1870.

The facts are stated in the opinion.

GRAVES, J.—The plaintiff in error sued Hasceig for the alleged conversion of a quantity of standing corn, which Tripp claimed as his property, and upon the trial a verdict passed for Hasceig. Tripp now brings error and insists that the Circuit Judge erred in charging the jury, and he asks that the judgment be reversed therefor.

The evidence conduced to show that Tripp, being the owner of a farm in Kalamazoo county, on which he resided and on which he had raised a field of corn in the season of 1865, conveyed the farm to defendant about the 13th of December, in the same year, by warranty deed, while the corn was still standing, unsevered, where it grew, and without inserting in the deed any exception or reservation; and that Hasceig took and appropriated a part of the crop as properly conveyed to him by the deed. It was claimed by Tripp on the trial that the crop, being over ripe when the deed was given, did not pass by the conveyance, but the Circuit Judge

[17] See Childs' Personal Property, § 27.

advised the jury that the corn, though ripe and no longer deriving nourishment from the ground, would, if still attached to the soil, pass by conveyance of the land; and this is one of the rulings complained of.

We think this instruction was right, and we concur in the suggestion of the Circuit Judge, that whether the corn would pass or not, could no more depend upon its maturity or immaturity, than the passage of a standing forest tree by the conveyance of the land, would depend upon whether the tree was living or dead.

It is true that the authorities in alluding to this subject very generally use the words growing crops, as those embraced by a conveyance of the land, but this expression appears to have been commonly employed to distinguish crops still attached to the ground, rather than to mark any distinction between ripe and unripe crops.

In some cases, where the question has been raised under the statute of frauds, as to the validity of verbal sales of unsevered crops, a distinction has been drawn between such as were fit for harvest, and such as were not, upon the supposition that the former would not be within the statute, while the latter would be embraced by it. See cases referred to in Austin v. Sawyer, 9 Cow. R., 39. In Austin v. Sawyer, however, Chief Justice Savage seems to have rejected the distinction, as he held that a verbal sale of growing crops was valid in New York.

But one case has been cited, or is remembered, in which it has been intimated that a mature and unsevered crop, would, because of its being ripe, remain in the grantor of the land, on an absolute conveyance of the premises without exception or reservation; and that is the case of Powell v. Rich, 41 Ill., 466 and the point was not essential to the decision there.

There are many authorities, however, opposed to the distinction suggested in that case. 2 Bl. Com. 122, note 3; Broom's Maxims, 354, margin.

In Kittredge v. Woods, 3 N. H., 503, Judge Richardson cites Wentworth, 59, for the proposition that "when the land is sold and conveyed without any reservation whatever crop is upon the land passes," and after stating that ripe grain in the field is subject to execution as a chattel, Judge Richardson adds: "Yet no doubt seems ever to have been entertained that it passes with the land when sold without any reservation." And in the case of Heavilon v. Heavilon, 29 Ind., 509, cited by plaintiff's counsel on another ground, the Court expressly admit that until severance,

the crop, as between vendor and purchaser of the land, is part of the realty. Indeed, the authorities are quite decisive that, whether the crop of the seller of the farm goes with the land to the purchaser of the latter, when there is no reservation or exception, depends upon whether the crop is at the time attached to the soil, and not upon its condition as to maturity. And this seems to be the most natural and most practical rule. When parties are bargaining about land, the slightest observation will discover whether the crops are severed or not, and there will be no room for question or mistake as to whether they belong with the land or not, if owned by the vendor.

If, however, the crops are to be considered as land or personal chattels, as they continue or do not continue to draw nourishment from the soil, the instances will be numerous in which very difficult inquiries will be requisite to settle the point

The judgment of the Court below is affirmed with costs.

CAMPBELL, CH. J. and COOLEY, J., concurred.

CHRISTIANCY, J.—I concur with my brethren in the opinion of my brother Graves; but had it appeared in the case that it was the custom of the country where the farm was situated, (as it is in some of the Western states), to keep the ripe corn in the field for the winter, or till wanted for use or market, and to be taken only on the like occasions or for the like reasons as if stored in the crib or granary,—thus using the field merely as a substitute for such crib or granary,—I am inclined to think I might have agreed in the opinion intimated by the Supreme Court of Illinois in Powell v. Rich, 41 Ill. 466, cited by brother Graves.[18]

HECHT v. DITTMAN.

56 Iowa 679, 7 N. W. 495, 41 Am. Rep. 131. 1880.

The facts are stated in the opinion.

BECK, J.—1. Two cases are presented together in this appeal. They involve the same facts and rules of law, and are between the same parties; they are, therefore, properly submitted together upon

[18] See Childs' Personal Property, §§ 28, 29.

the same abstract. There is no dispute as to the facts, which are as follows: The property replevied is barley cut and in shocks, and oats, being partly threshed and partly in bundles or sheaves, all upon the premises where it was grown. The defendant had rented the land of one Ehrpe, who had previously executed two mortgages thereon,—one, the senior encumbrance, to the New England Loan Company, and the other to the plaintiff, Hecht. After defendant had rented the land plaintiff foreclosed his mortgage, and on the seventh day of July, 1879, the time for the redemption from the sale as prescribed by the statute having expired, a deed was executed by the sheriff. The other mortgage was foreclosed and the land was sold to one, not a party to this transaction, and the time of redemption under the statute expired August 15, 1879, when a sheriff's deed was made. The foreclosure and sale under this mortgage cut off all claim or title held by plaintiff as well as by the mortgagor. Defendant continued in possession of the land up to the trial in the court below. At the time plaintiff received his deed the grain was not cut, but it was mature and ready for harvesting before that day. Rainy weather had prevented the defendant from cutting the grain before plaintiff's deed was executed. The court instructed the jury that the title of the grain passed to plaintiff by the sheriff's deed, and directed a verdict for plaintiff. We are required to determine whether this view of the law be correct.

2. The sheriff's deed executed upon the foreclosure sale vested plaintiff with the title of the land, and the right to all growing crops followed the title thus acquired. Downard v. Graff, 40 Iowa, 597. This rule, we think, is not applicable to grain which has matured and is ready for the harvest. It then possesses the character of personal chattels, and is not to be regarded as a part of the realty. See 1 Schouler's Personal Property, 125-126; Bingham on Sales of Real Property, 180-181. This conclusion is well supported upon the following reasons: The grain being mature, the course of vegetation has ceased, and the soil is no longer necessary for its existence. The connection between the grain and the ground has changed. The grain no longer demands nurture from the soil. The ground now performs no other office than affording a resting place for the grain. It has the same relations to the grain that the warehouse has to the threshed grain, or the field has to the stacks of grain thereon. It will not be denied that when the grain is cut it ceases to be a part of the realty. The act of cutting it, it is true, appears to sever the straw from the land. But it is

demanded by the condition of the grain. It is no longer growing. It is no longer living blades, which require the nourishment of the soil for its existence and development. It is changed in its nature from growing blades of barley or oats to grain mature, and ready for the reaper. Now the mature grain is not regarded by the law, like the growing blades, as a part of the reality, but as grain in a condition of separation from the soil.

Suppose the defendant had cut a part of the 72 acres of grain in controversy; the grain so cut, it will not be denied, would not have passed to plaintiff. There is no valid reason why the act of cutting should change the property in the grain. The work required time, and, therefore, plaintiff loses a part of his property. All of the grain is in the same condition—all ready for the reaper. The part cut is his property, while the part uncut belongs to the land owner. We think the ownership of the grain should be determined by its condition, not by the act of cutting, which cannot be done as soon as it is demanded by its condition. We conclude that for the reason the grain was mature, and was uncut because defendant has been unable to do the work, it cannot be regarded as a part of the realty which passed with the deed to plaintiff.

The judgment of the circuit court must be reversed.[19]

5

DEBTOR AND CREDITOR.

POLLEY v. JOHNSON et al.

52 Kan. 478, 35 Pac. 8, 23 L. R. A. 258. 1893.

The facts are stated in the opinion.

ALLEN, J.—Defendants in error, as plaintiffs below, brought their action against plaintiff in error to enjoin him from harvesting and carrying away about 90 acres of wheat, grown on a quarter section of land in Lincoln county. The wheat was sown in the fall of 1888 by H. H. Meer, who then owned and occupied the land as his homestead. On the 4th day of October he executed a deed for the land to Edward H. Thuse. His wife was in the insane asylum at the time, and he signed the deed also as her guardian. The copy of this deed contained in the record does

[19] See Childs' Personal Property, §§ 28, 29.

not show any approval by the probate court, but no point on the want of approval is made by either party. On the 23d day of October an attachment issued in a suit against Meer by a justice of the peace, was levied on the crop of wheat, and on the 11th of December, 1888, the constable sold the same to the plaintiffs. Thuse conveyed the land on January 5, 1889, to Emma Meer, wife of H. H. Meer. He testified on the trial that he paid nothing for the farm, and was to deed it back to Meer's wife, if she got well, or any other party he traded with or sold to. On January 31, 1889, Meer and wife conveyed the land to defendant Polley.

* * * We think this case must be considered as though no change of title occurred until the execution of the deed by Meer and wife to Polley, which was after the sale of the growing wheat.

The second contention is that growing wheat sown by the owner of the soil is a part of the realty until ripe and ready to sever from the soil, and therefore is not subject to attachment as personalty. In support of this proposition, Washb. Real Prop. (2d Ed.), p. 4; Burleigh v. Piper, (Iowa), 2 N. W. 520, and Ellithorpe v. Reidesil, 32 N. W. 238, are cited. The last of these authorities, which is a case decided by the Supreme Court of Iowa, fully sustains this contention; and it is said in the opinion: "The whole proceeding was on the theory that the crops were personal property, and could be levied on and sold as such; but while they remained immature, and were being matured by the soil, they were attached to and constituted part of the realty; they could no more be levied upon and sold on execution as personalty than could the trees growing upon the premises. This doctrine is elementary, and it has frequently been declared by this court. Downard v. Groff, 40 Iowa 597; Burleigh v. Piper, 51 Iowa 650, 2 N. W. 520; Hecht v. Dittman, 56 Iowa 679, 7 N. W. 495, and 10 N. W. 241; Martin v. Knapp, 57 Iowa 336, 10 N. W. 721." It must be conceded that there is much force in the reasoning to sustain this position. It is a well-established rule that a conveyance of land, either by voluntary deed or judicial sale without reservation, carries all growing crops with the title to the land. * * * In the case of Beckman v. Sikes, 35 Kan. 120, 10 Pac. 592, it was held that a sale under a mortgage foreclosure carried to the purchaser growing crops planted after the decree of foreclosure was entered as against a purchaser, who bought from the mortgagor the growing crop one day before the sale by the sheriff. In the opinion the court says: "The lien of the mortgage and the judgment, however, attached to the growing crops until they

were severed, as well as to the land. The mortgagor planted the crop, knowing that it was subject to the mortgage, and liable to be divested by the foreclosure and sale of the premises. Any one who purchased said crops from him took them subject to the same contingency, as the recorded mortgage and the decree of foreclosure were notice to him of the existence of the lien. If the land is not sold until the crops ripen and are severed, the vendee of the mortgagor would ordinarily get a good title; but if the land was sold and conveyed while the crop was still growing, and there was no reservation, or waiver of the right to the crop, at such sale the title to the same would pass with the land." * * *

It will be observed that the decisions in all these cases relate to the rights of mortgagors, mortgagees, and parties claiming under them. In this case we have a different question to consider. * * * We have here the bare question as to whether immature growing crops are a part of the realty, as between debtor and creditor, or are personal property, subject to attachment and sale for debt. In Caldwell v. Custard, 7 Kan. 303, it was said "that growing crops are personal estate." In 1 Freem. Ex'ns, § 113, it is said: "Crops, whether growing, or standing in the field ready to be harvested, are, when produced by annual cultivation, no part of the realty. They are therefore liable to voluntary transfer as chattels. It is equally well settled that they may be assigned and sold under execution. At common law, *fructus industriales*, as growing corn or other annual products, which would go to the executors upon death, may be taken upon execution." The author cites a long list of authorities in support of his position. In 3 Washb. Real Prop., p. 367, the author says: "But although a sale of growing crops of annual culture not yet mature would seem to carry with it an interest in land, since a crop must stand upon and draw nutriment from the soil until it shall have grown and matured for the harvest, the cases appear to be quite uniform in holding that the property in the crop would pass, with a license to enter and sever the same; and some of the English cases put it upon the same ground as that by which one may hold emblements growing upon the soil of another. An attempt to sum up the results of the decisions, although they are not wholly harmonious, may be made as follows: *Fructus industriales*, as has been previously said, are, at common law, chattels, and are governed by the seventeenth section of the statute of frauds. This seems to be agreed by all the cases, though it is often difficult to decide what are *fructus industriales*." In Benj. Sales, p. 126, it is said: "As

to artificial or annual crops, *fructus industriales,* the law is quite clear that a sale thereof, in whatever state of maturity, and however long they are to remain in the soil in order to complete their growth, is a sale of personal property, and not of an interest in land." * * * We think the authorities greatly preponderate in support of the proposition that annual crops, fruits of the labor of the tiller of the soil, are personal property, subject to levy and sale as chattels for the debts of the owner. * * * The statutes of this state also seem to recognize this rule. * * * While these sections do not reach the case we have under consideration, we think they show a recognition of what we regard as the settled doctrine of the common law,—that such growing crops are personal property, subject to sale on execution for the debts of the owner; * * * However much we may disapprove of the policy of the law, we are constrained to hold that the growing wheat attached in this case was subject to levy, and to affirm the judgment. All the justices concurring.[20]

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b

LANDLORD AND TENANT.

Tenancy Uncertain.

CARMEN v. MOSIER et al.

105 Iowa 367, 75 N. W. 323. 1898.

[Suit to recover for the use and occupation of land, and to restrain the defendants from removing the crops growing on said land. The case was tried upon an agreed statement of facts. Judgment for plaintiff and defendants appealed. Further facts are stated in the opinion.]

DEEMER, C. J.—Appellee is, and has been for many years, the owner in fee simple of the land occupied by the defendants. Sarah Schutter, the mother of appellee and of appellant Elizabeth Mosier, was possessed of a life estate in these lands from June, 1888, to the date of her death, April 11, 1896. Appellant William Mosier, the husband of his co-defendant, rented the premises from the life tenant for the year beginning March 1, 1896, agreeing for the use thereof to clothe, board, and care for the life tenant during the term of the lease. Mosier entered into possession of the

[20] See Childs' Personal Property, §§ 28, 29.

premises, hauled manure, and prepared the land for seeding prior to the death of the life tenant, and thereafter raised a crop of corn thereon. Appellants were at all times ready and willing to comply with their contract, and furnish their lessor as agreed, provided she would live with them, but for some reason—not due to any fault of appellants, however—she was cared for by other parties until her death, in April. Emma Carman and Elizabeth Mosier are the sole and only heirs and personal representatives of the life tenant.

These are the material facts gathered from the agreed statement, and it need only be added that the parties also agreed that, if the court found plaintiff entitled to recover, she should have one-half of the corn grown upon the premises or the value thereof, to be protected in the manner as finally decreed by the trial court.

In order that appellee may recover, she must show that, as owner of the reversion, she is entitled to compensation for the use and occupation of the land, or that as an heir, or as one of the personal representatives of the deceased life tenant, she is entitled to some part of the rent reserved. It will be observed that the consideration for the lease was an agreement to support the lessor during the term of the lease, and that appellants performed their obligation so far as they were able to do so. Now, it is probably true that the death of the lessor relieved them of any further obligation as to her. But this conclusion by no means settles the controversy, for the general rule seems to be that upon the death of a tenant for life all interest of his lessee ceases. Page v. Wight, 14 Allen 182; Hoagland v. Crum, 113 Ill. 365; Peck v. Peck, 35 Conn. 390; 1 Washb. Real Prop. (3d Ed.), p. 105. Such lessee has no greater rights than his lessor, and the estate acquired by him is subject to be defeated by the death of the tenant for life. A tenant for life, or any other tenant whose estate is of uncertain duration, has the right to emblements. These are defined to be the profits which the tenant of an estate is entitled to receive out of the crops which he has planted, and which have not been harvested, when his estate terminates. Under this term are included, as a rule, only such products of the soil as are of annual growth and cultivation. In the case of Reilly v. Ringland, 39 Iowa 106, it is said: "It is a broad and almost universal principle that the tenant who sows a crop shall reap it, if the term of his tenancy be uncertain. / In order to entitle a tenant or his executor or administrator to emblements, his tenancy must be uncertain in its duration. / In the next place, the tenancy must be determined by act of God. One of the important rights

of a tenant for life is this right to emblements or profits of the crop which the law gives him, or his executor, if he be dead, to compensate for the labor and expense of tilling and sowing the land." In the case before us the tenancy was terminated by act of God, but it does not appear that the life tenant, or his lessee, had planted any crops at the time the estate terminated; and, as the right to emblements seems to be based upon the sowing or planting of the crop, the tenants had no right to use and occupy the land under their lease. If the estate is terminated before the seed is actually sown, there will be no right to emblements. Nor can the cost of preparing the ground for the reception of the seed be recovered. Lane v. King, 8 Wend. 584; Price v. Pickett, 21 Ala. 741; Thompson's Adm'r v. Thompson's Ex'r, 6 Munf. 514; Gee v. Young, 2 N. C. 17. As appellants had not planted the corn which they now seek to hold under the rule relating to emblements, their estate terminated with the death of their lessor, and they are liable to the reversioner or remainder-man for the use and occupation of the premises. The rule at common law seems to have been that the reversioner was entitled to the entire rent, but this was cured by statute (Code 1873, § 2011), which provides for the apportionment of the rent. See, also, Code, § 2988. As the parties have agreed, however, upon the amount of the recovery, we have no occasion to construe this section, or to attempt to apply it to the facts of this case. The mere fact that appellants have paid the rent for the full term is not controlling. Their estate was liable to be extinguished at any time by the death of their lessor, and when so extinguished they had no further right of occupation, unless to reap what they had sown. As they had sown nothing, they became liable for use and occupation during the remaining period of the lease. The judgment of the trial court was right, and it is affirmed.[21]

TENANCY CERTAIN.

CARNEY v. MOSHER et al.

97 Mich. 554, 56 N. W. 935. 1893.

The facts are stated in the opinion.

MONTGOMERY, J.—The plaintiff brought trover for wheat grown upon land owned by defendant Orrin B. Mosher. The wheat was

[21] See Childs' Personal Property, § 29.

sown by Alvin L. Mosher while occupying the land as the tenant of Orrin B. The wheat was harvested by defendant Mosher, and sold to defendant Henry S. Walworth, who it is claimed, had notice of plaintiff's rights. Prior to the spring of 1890, Alvin L. Mosher had occupied the land under a written lease, and in the spring of that year renewed his lease for one year by oral agreement. There had been a previous lease, and, as the testimony of plaintiff shows, on the occasion of the present letting, Alvin refused to pay the rent previously reserved, unless he should have the privilege of putting the land all into wheat, and it was agreed that he might do so. He proceeded to sow the land to wheat, and in January, 1891, sold the growing crop to plaintiff. In the spring, Alvin surrendered possession to Orrin B., who proceeded to reap the crop, after notice of plaintiff's purchase. The circuit judge directed a verdict for defendants on the ground that the lease was oral, and that the implied provision that the lessee should have the right to reap the crop of wheat was void, under the statute of frauds. * * *

If it be assumed that the tenant was in possession by right, and under a lease which gave him the right to reap the crop, as well as to sow, it follows that inasmuch as he sold the crop before any default on his part, so far as appears, and certainly before forfeiture, the purchaser from him obtained a title which could not be defeated by the lessee's subsequent default. This is the rule established in this state by Nye v. Patterson, 35 Mich. 413, and Miller v. Havens, 51 Mich. 482, 16 N. W. Rep. 865. See, also, Dayton v. Vandoozer, 39 Mich. 749. The question for our determination, therefore, is the one upon which the case was decided below, namely, did the parol lease for one year, with the agreement that the tenant might sow the land to wheat, give him a right to enter after the expiration of his lease, and reap the crop? On the part of the defendants, it is contended that the right claimed is in the nature of an interest in land, and that to sustain the right to reap the crop would be, in effect, extending the lease into the second year, and that said contract is therefore void, under the statute of frauds. On the other hand, it is contended that the lease terminated, according to its terms, at the end of one year, and that the right to enter in and reap the crop is one growing out of the nature of the previous lease, which has expired. It is very evident that, whatever the right to enter and reap the crop be called, it was a right which could not be exercised within one year. We think it is equally evident that it was an interest in land. The

exclusive use of the land was required during three months after the end of a year from the letting, before the crop would ripen. That this was a burden upon the estate in the land is too plain for argument. It was held to be an interest in the land in Reeder v. Sayre, 70 N. Y. 183. In the present case, the lessee was in possession at the time of entering into the contract, and continued in possession under the void lease. This constituted him a tenant at will, under our holdings. See Huyser v. Chase, 13 Mich. 98. The tenancy could be terminated by either party on three months' notice to quit. The tenant did not wait for this, but left the premises in January or February, 1891. He paid no rent. The owner thereupon took possession, as he had a right to do, and as he could, but for the lessee's peaceable surrender, have done by a notice to quit. If it be suggested that treating the lease is void, under the statute of frauds, the tenant should, because of his previous relations, be treated as a tenant from year to year, he stands in no better situation, for the year would be terminated, under such holding, March 31, 1891, giving the owner the right to possession thereafter, and the right to reap the crop. The judgment will be affirmed with costs. The other justices concurred.[22]

RIGHTS OF UNDERTENANTS.

GRAY v. WORST.

129 Mo. 122, 31 S. W. 585. 1895.

The facts are stated in the opinion.

BARCLAY, J.—We adopt substantially the statement of the plaintiff in this court as giving a fair outline of the controversy. The action was instituted in the circuit court of Jasper county, August 16, 1892. The plaintiff, in his petition, claimed that in June, 1892, he was the owner of certain land in said county, and also the owner of 27 acres of wheat, 20 acres of oats, and 33 acres of corn and potatoes standing and growing upon said premises; and that afterwards the defendant wrongfully took said crops, and severed the same from said land, and converted them to his own

[22] See Childs' Personal Property, §§ 28, 29.

use, to plaintiff's damage in the sum of $700, for which he prayed judgment. The defendant's answer consisted—First, of a general denial; second, statement that in August, 1891, he rented said premises from Seth Shoemaker, for a term ending September 1, 1892, and in October, 1891, paid Shoemaker the full amount of rent due under his lease for said term. A trial was had by the court, without the intervention of a jury, and resulted in a finding and judgment for defendant. In due time plaintiff filed a motion for a new trial, which being overruled, he brought the case to this court by appeal.

The facts disclosed on the trial are substantially as follows: August 1, 1888, James S. Shoemaker (sometimes called "Seth" Shoemaker) was the owner of the land referred to, and executed a deed of trust (duly recorded) conveying said land to George W. Toms, as trustee, to secure a note of $1,000, payable to the Mutual Benefit Life Insurance Company, of Newark, New Jersey. * * * It was further provided that, in default of compliance with any of the covenants of the deed, the whole debt might (at the option of the holder of the indebtedness secured) become due, and a sale of the mortgaged premises might then be had, after due advertisement of said sale for 30 days in a newspaper published in the county where the land lay. * * * Default was made in the payment of taxes for the years 1890 and 1891, and in the payment of the interest coupon maturing April 1, 1892. Toms, as trustee, resigned his trust, and the sheriff of Jasper county, acting as trustee, at the request of the legal holder of said note and coupons, advertised the property for sale. * * * On June 18, 1892, the property was sold by the sheriff, acting as trustee, and purchased by plaintiff, to whom a deed in regular form was executed. * * *

* * * The estate of defendant having been terminated before the efflux of its full term, by means of the sale already mentioned, which occurred without any default on his part, brings the defendant within the protection of the general rule as to the right to growing crops between landlord and tenant. The defendant had paid in advance his rent in full to September, following the sale, and the termination of the estate, June 18, 1892, occurred through no fault of his. He had not assumed any of the obligations to pay the principal debt secured. He was a mere tenant of the original debtor. He came lawfully into possession of the premises, and severed the crop before he gave up the possession.

We shall not undertake to define the precise classification of the tenancy which the deed of trust established. Whatever the duration of that tenancy, it is clear, from the language defining it, that the landlord's assent was given to the assignment or transfer of the possession. So defendant's holding was lawful.

It is also plain that until the creditor secured by the deed of trust elected to resort to the land, and thus enforce his security, the principal debtor might, at any time, by making the proper payments according to his agreement in the deed, have cured any prior default. Having accepted payment of rent from Mr. Worst to September, 1892, he was in duty bound to make those payments to preserve to his tenant the possession to which the rent gave the tenant right as between themselves. When the creditor exercised his option to proceed and to assert his paramount claim, the termination of the subtenant's term, which thus resulted, came strictly within a rule of the law of emblements which we have transplanted from the English system, and which yet remains in effect as part of the great body of jurisprudence derived from that source. Rev. St. 1889, § 6561. The rule on this point is stated by one of the text writers on the law of landlord and tenant as follows: "But, although no indulgence is given in such cases to tenants themselves, it has been extended to undertenants who have not participated in destroying the estate. Where, therefore, a tenant for years, whose lease depended on a certain condition, underlet the land, and his underlessee sowed corn, and afterwards the first tenant broke the condition, and so forfeited the lease, by means of which they were all ousted, the undertenant was, nevertheless, allowed to enter and cut the corn when it was ripe." Tayl. Landl. & Ten. The case at bar does not require us to go quite so far as the general rule just quoted, and we certainly do not purpose to extend our ruling beyond the facts in judgment. Here there is no question of any right to re-enter. The tenant reaped his crop while in possession, and before surrendering to the purchaser at the trustee's sale. The action does not deal with any other question than the contested right to recover for the crop so harvested by the person whose industry planted it. On that state of facts, we feel no doubt in holding that the value of the crops, so secured by the tenant, cannot be recovered from him by the purchaser under the trustee's title. The case seems to us to fall clearly within range of the sound principles of policy which give reason to the law of emblements.

The judgment of the learned trial judge was obviously for the right party. It should therefore be affirmed. Rev. St. 1899, § 2100. It is so ordered.

BRACE, C. J., and MACFARLANE, J., concur. ROBINSON, J., concurs in the result.[23]

STANDING TIMBER. 9

HIRTH v. GRAHAM.

50 Ohio St. 57, 33 N. E. 90; 40 Am. St. Rep. 641, 19 L. R. A. 721. 1893.

The facts are stated in the opinion.

BRADBURY, J.—The plaintiff in error brought an action before a justice of the peace to recover of the defendant in error damages alleged to have been sustained on account of the refusal of the latter to perform a contract by which he had sold to the plaintiff in error certain growing timber. The defendant attempted to secure the dismissal of the action, on the ground that the justice had no jurisdiction of an action for the breach of such a contract. Failing in this, and the action being tried to a jury, he requested the justice to instruct the jury "that if they find from the evidence that the trees about which this action is brought were at the time of said alleged contract then growing upon the land of defendant, and that no note or contract or memorandum of the contract of sale was at the time made in writing, the plaintiff cannot maintain this action, and your verdict should be for the defendant," which instruction the justice refused to give, but on the contrary gave to them the following instructions on the subject: "This is an action for damage, not on the contract, nor to enforce the same; and if you find that a contract was made verbal or otherwise and the defendant refused or failed to comply with its terms, the plaintiff is entitled to any damage you may find him to have sustained by way of such noncompliance." The defendant in error, who was also the defendant in the justice's court, excepted, both to the charge as given and to the refusal to charge as requested; the verdict and

[23] See Childs' Personal Property, § 29.

judgment being against him, he embodied the charge as given, as well as that refused, in separate bills of exceptions, and brought the cause to the court of common pleas on error, where the judgment of the justice of the peace was affirmed. He thereupon brought error to the circuit court, where the judgments of the court of common pleas and that of the justice were both reversed, and it is to reverse this judgment of the circuit court, and reinstate and affirm those of the court of common pleas and justice of the peace, that this proceeding is pending.

Counsel for plaintiff in error contends that the record contains nothing to show that the trees which were the subject of the contract were standing or growing, and that therefore it does not appear that the defendant was injured by the instructions given and refused. The record does not support this contention. During the trial three separate bills of exceptions were taken, and, when all of them are considered together, it clearly appears that evidence was given tending to prove that the trees, the subject of the contract, were growing on the land at the time it was made, and that the contract was not evidenced by any note or memorandum in writing. The instruction refused was, therefore, pertinent, and if it contained a sound legal proposition the refusal to give it in charge to the jury was prejudicial to the defendant. * * *

Whether a sale of growing trees is the sale of an interest in or concerning land has long been a much controverted subject in the courts of England, as well as in the courts of the several states of the Union. The question has been differently decided in different jurisdictions, and by different courts, or at different times by the same court within the same jurisdiction. The courts of England, particularly, have varied widely in their holdings on the subject. Lord Mansfield held that the sale of a crop of growing turnips was within this clause of the statute. Emmerson v. Heelis, 2 Taunt. 38, following the case of Waddington v. Bristow, 2 Bos. & P. 452, where the sale of a crop of growing hops was adjudged not to have been a sale of goods and chattels merely. And in Crosby v. Wadsworth, 6 East 602, the sale of growing grass was held to be a contract for the sale of an interest in or concerning, land, Lord Ellenborough saying: "Upon the first of these questions," (whether this purchase of the growing crop be a contract or sale of lands, tenements, or hereditaments, or any interest in or concerning them.) "I think that the agreement stated, conferring, as it professses to do, an exclusive right to the

vesture of the land during a limited time and for given purposes, is a contract or sale of an interest in, or at least an interest concerning, lands." Id. 610. Afterwards, in Teal v. Auty, 2 Brod. & B. 99, the court of common pleas held a contract for the sale of growing poles was a sale of an interest in or concerning lands. Many decisions have been announced by the English courts since the cases above noted were decided, the tendency of which have been to greatly narrow the application of the fourth section of the statute of frauds to crops, or timber, growing upon land. Crops planted and raised annually by the hand of man are practically withdrawn from its operation, while the sale of other crops, and in some instances growing timber, also, are withdrawn from the statute, where, in the contemplation of the contracting parties, the subject of the contract is to be treated as a chattel. The latest declaration of the English courts upon this question is that of the common pleas division of the high court of justice, in Marshall v. Green, 1 C. P. Div. 35, decided in 1875. The syllabus reads: "A sale of growing timber to be taken away as soon as possible by the purchaser is not a contract or sale of land, or any interest therein, within the fourth section of the statute of frauds." This decision was rendered by the three justices who constituted the common pleas division of the high court of justice, Coleridge, C. J., Brett and Grove, JJ., whose characters and attainments entitle it to great weight; yet, in view of the prior long period of unsettled professional and judicial opinion in England upon the question, that the court was not one of final resort, and that the decision has encountered adverse criticism from high authority, (Benj. Sales, [Ed. 1892,] § 126,) it cannot be considered as finally settling the law of England on this subject. The conflict among the American cases on the subject cannot be wholly reconciled. In Massachusetts, Maine, Maryland, Kentucky, and Connecticut sales of growing trees, to be presently cut and removed by the vendee, are held not to be within the operation of the fourth section of the statute of frauds. Claflin v. Carpenter, 4 Metc. (Mass.) 580; Nettleton v. Sikes, 8 Metc. (Mass.) 34; Bostwick v. Leach, 3 Day, 476; Erskine v. Plummer, 7 Me. 447; Cutler v. Pope, 13 Me. 377; Cain v. McGuire, 13 B. Mon. 340; Byassee v. Reese, 4 Metc. (Ky.) 372; Smith v. Bryas, 5 Md. 141. In none of these cases, except 4 Metc. (Ky.) 373, and in 13 B. Mon. 340, had the vendor attempted to repudiate the contract before the vendee had entered upon its execution, and the statement of facts in those two cases do not speak clearly upon this point. In the

leading English case before cited, (Marshall v. Green, 1. C. P. Div. 35,) the vendee had also entered upon the work of felling the trees, and had sold some of their tops before the vendor countermanded the sale. These cases, therefore, cannot be regarded as directly holding that a vendee, by parol, of growing timber to be presently felled and removed, may not repudiate the contract before anything is done under it; and this was the situation in which the parties to the case now under consideration stood when the contract was repudiated. Indeed, a late case in Massachusetts, (Giles v. Simonds, 15 Gray, 441,) holds that "the owner of the land, who has made a verbal contract for the sale of standing wood to be cut and severed from the freehold by the purchaser, may at any time revoke the license which he thereby gives to the purchaser to enter his land to cut and carry away the wood, so far as it relates to any wood not cut at the time of the revocation." The courts of most of the American states, however, that have considered the question, hold expressly that a sale of growing or standing timber is a contract concerning an interest in lands, and within the fourth section of the statute of frauds. Green v. Armstrong, 1 Denio, 550; Bishop v. Bishop, 11 N. Y. 123; Westbrook v. Eager, 16 N. J. Law, 81; Buck v. Pickwell, 27 Vt. 157; Cool v. Lumber Co., 87 Ind. 531; Terrell v. Frazier, 79 Ind. 473; Owens v. Lewis, 46 Ind. 488; Armstrong v. Lawson, 73 Ind. 498; Jackson v. Evans, 44 Mich. 510, 7 N. W. Rep. 79; Lyle v. Shinnebarger, 17 Mo. App. 66; Howe v. Batchelder, 49 N. H. 204; Putney v. Day, 6 N. H. 430; Bowers v. Bowers, 95 Pa. St. 477; Daniels v. Bailey, 43 Wis. 566; Lillie v. Dunbar, 62 Wis. 198, 22 N. W. Rep. 467; Knox v. Haralson, 2 Tenn. Ch. 232. The question is now, for the first time, before this court for determination; and we are at liberty to adopt that rule on the subject most comformable to sound reason. In all its other relations to the affairs of men, growing timber is regarded as an integral part of the land upon which it stands; it is not subject to levy and sale upon execution as chattel property; it descends with the land to the heir, and passes to the vendor with the soil. Jones v. Timmons, 21 Ohio St. 596. Coal, petroleum, building stone, and many other substances constituting integral parts of the land, have become articles of commerce, and easily detached and removed, and, when detached and removed, become personal property, as well as fallen timber; but no case is found in which it is suggested that sales of such substances, with a view to their immediate removal, would not be within the statute. Sales of growing timber are as likely

to become the subjects of fraud and perjury as are the other integral parts of the land, and the question whether such sale is a sale of an interest in or concerning lands should depend not upon the intention of the parties, but upon the legal character of the subject of the contract, which, in the case of growing timber, is that of realty. This rule has the additional merit of being clear, simple, and of easy application,—qualities entitled to substantial weight in choosing between conflicting principles. Whether circumstances of part performance might require a modification of this rule is not before the court, and has not been considered. Judgment affirmed.[24]

Start Sat Oct 3 1925 stop Saturday Oct 23, 1926

FRUITS.

PURNER v. PIERCY.

40 Md. 212, 17 Am. Rep. 591. 1874.

[The plaintiff and the defendant contracted by parol for the purchase from the plaintiff of a crop of peaches then growing in the plaintiff's orchard. The defendant was to gather the peaches as they matured. He paid a part of the purchase price when the contract was made, and later, before any of the peaches were gathered, he paid a further sum. He gathered and removed the peaches as they matured, but failed to pay the balance due, whereupon the plaintiff brought action to recover the sum due.]

STEWART, J.— * * * But the defendant's counsel insists that the contract was invalid under the operation of the 4th section of the Statute of Frauds. That section provides that no action shall be brought to charge any person upon any contract or sale of lands, or any interest in or concerning them, unless the agreement upon which such action shall be brought, or some memorandum thereof, shall be in writing, &c.

Agreement and contract seem to be considered in the section of the same purport, and the appellant's counsel insists the contract or agreement relied upon here to charge the defendant, is for lands, or some interest in or concerning them, and therefore not to be established by parol proof.

[24] See Childs' Personal Property, § 27.

It would be giving to the Statute a very latitudinarian construction to bring the case in question within the mischief designed to be avoided by the Statute. We have been referred to no case in this State, and have found none to sanction such doctrine. The cases of Ellicott v. Peterson's Ex'crs, 4 Md. 476, and Smith v. Bryan, 5 Md. 141, are against such enlarged construction.

There is certainly some conflict in the adjudged cases in regard to the interpretation of contracts for the sale of crops and the natural products growing upon land; and it is difficult to deduce therefrom any clearly defined rule upon the subject.

Mr. Alexander, in his admirable treatise on the British Statutes in force here, has carefully referred to numerous cases, both English and American, and deduced therefrom the distinctions which seemed to have prevailed in regard to the operation of the Statute in relation to growing crops and other produce on land. At page 532 *et seq.*, contracts, as to the natural product of the land, are distinguished from such as relate to crops raised by the industry of man, and yielding an annual profit. A distinction is also noted between the natural produce when severed by the seller or by the buyer. He refers to the recent work of Benjamin on Sales, 84 et seq., for a fuller discussion. Mr. Benjamin, at p. 99, remarks, from all that precedes, the law on the subject of the sale of growing crops may be summed up in the following proposition, viz: Growing crops, if *fructus industriales,* are chattels, and an agreement for the sale of them, whether mature or immature, whether the property in them is transferred before or after severance, is not an agreement for the sale of any interest in land, and is not governed by the 4th section of the Statute of Frauds. Growing crops, if *fructus naturales,* are part of the soil, *before severance,* and an agreement therefore vesting an interest in them in the purchaser before severance, is governed by the 4th section; but if the interest is not to be vested till they are converted into chattels by severance, then the agreement is an executory agreement for the sale of goods, wares and merchandise, governed by the 17th, and not by the 4th section of the Statute.

Assuming these distinctions to be well founded, still what is the natural and what the artificial product remains to be determined in each case. Mr. Phillips, in his work on Evidence, 3 vol., 250, says, the Statute does not include agreements for the sale of the produce of a given quantity of land, and which will afterwards become a chattel; though some advantage may accrue to the vendee by its continuing for a time in the land.

In Taylor's recent book on the Law of Evidence, 2d vol., sec. 952, the following propositions are submitted: 1st. A contract for the purchase of fruits of the earth, ripe, though not yet gathered, is not a contract for any interest in lands, though the vendee is to enter and gather them. 2nd. A sale of any growing produce of the earth, reared annually by labor and expense, and in actual existence at the time of the contract, as for instance a growing crop of corn, hops, potatoes, or turnips, is not within the 4th section, though the purchaser is to harvest or dig them. 3rd. An agreement respecting the sale of a growing crop of fruit, or grass, or of standing underwood, growing poles or timber, is within the 4th section, and a written contract of sale cannot be dispensed with. However sound his 1st and 2nd propositions, we think his 3rd is to be taken with some qualification—and that a growing crop of peaches or other fruit, requiring periodical expense, industry and attention, in its yield and production, may be well classed as *fructus industriales* and not subject to the 4th section of the Statute.

Brown on Statute of Frauds, in sections 236, 237, 246, 247 and 249, and Greenleaf's Ev. 1 vol., sec. 271, have furnished from the adjudged cases, a construction more in consonance with our views upon the subject, and is substantially to the following effect: There is nothing in the vegetable or fruit which is an interest in, or concerning land, when severed from the soil, whether trees, grass and other spontaneous growth *(prima vestura)* or grain, vegetables, or any kind of crops *(fructus industriales)*, the product of periodical planting and culture; they are alike mere chattels, and the severance may be in fact, as when they are cut and removed from the ground; or in law, as when they are growing, the owner in fee of the land, by a valid conveyance, sells them to another person, or where he sells the land, reserving them by express provision.

As a general rule, if the products of the earth are sold specifically, and by the terms of the contract to be separately delivered, as chattels, such a sale is not affected by the 4th section of the Statute, as amounting to a sale of any interest in the land. When such is the character of the transaction, it matters not whether the product be trees, grass and other spontaneous growth, or grain, vegetables, or other crops raised periodically by cultivation—and it is quite as immaterial whether the produce is fully grown or in the process of growing, at the time of making the contract.

The circumstance that the produce purchased may, or probably,

or certainly will derive nourishment from the soil between the time of the contract and the time of the delivery, is not conclusive as to the operation of the Statute.

If the contract, when executed, is to convey to the purchaser a mere chattel, though it may be in the *interim* a part of the realty, it is not affected by the Statute; but if the contract is, in the *interim*, to confer upon the purchaser an exclusive right to the land for a time, for the purpose of making a profit of the growing surface, it is affected by the Statute, and must be in writing, although the purchaser is at the last to take from the land only a chattel.

To put a reasonable construction upon the terms of the 4th section of the Statute, from the evidence in this case, it is clear the contract in question is not within its meaning. It had been executed by the plaintiff, and the fruit had been gathered, and in fact paid for at the time of the suit.

It was in proof that a part of the fruit was prematurely ripe, at the time of the contract.

It would be a perversion of the objects of the Statute to hold as invalid, the sale, in other respects legal, of the growing crop of peaches, with no intent of the parties, to sell or purchase the soil, but affording a mere license, express or implied, to the purchaser to go upon the land, to gather the fruit and remove the same. Substantially, to use the language of sec. 271, of 1 Greenleaf's Ev., the transaction takes its character of realty or personalty from the principal subject-matter of the contract, and the interest of the parties, and, therefore, a sale of any growing produce of the earth, in actual existence, at the time of the contract, whether it be in a state of maturity or not, is not to be considered a sale of an interest in, or concerning the land. Where timber or other produce of the land, or any other thing annexed to the freehold, is specifically sold, whether to be severed from the soil by the vendor, or to be taken by the vendee, under a special license to enter for that purpose, it is still, in contemplation of the parties, a sale of goods only, and not within the Statute.

Judgment affirmed.[25]

[25] See Childs' Personal Property, § 27.

HOPS.

FRANK v. HARRINGTON.

36 Barb. (N. Y.) 415. 1862.

The facts are stated in the opinion.

BY THE COURT, MORGAN, J.—The question is whether hops, growing and maturing on the vines, are real or personal property.

When the argument was opened, I supposed that perhaps the decision of this question was involved in the judgment of the court of appeals in Bishop v. Bishop (11 N. Y. Rep. 123). But the counsel on both sides treat that case as one which depends upon other considerations, and not necessarily involved in the decision of this. The question there was whether hop poles were real or personal property; and they were declared to be real estate, because they were "habitually attached to the land," although "not constantly fastened to it." Gardiner, Ch. J., who delivered the opinion of the majority of the court, observed, however, that "the root of the hop is perennial, continuing for a series of years. That this root would pass to the purchaser of the real estate, there can be no question."

It is conceded in the very learned argument of the plaintiff's counsel in this case, that the root of the hop is real estate; but he contends that the crop itself, like grain, is personal property. And to this point he cites Latham v. Atwood (Croke Charles, 515). The report of that case states that the question was, "whether these hops appertained to the baron or to him in remainder." And the court held that "they be like emblements which shall go to the baron or executor of the tenant for life, and not to him in remainder; and are not to be compared to apples or roots which grow of themselves; wherefore adjudged for the plaintiff."

The same resolution was come to in an anonymous case reported in 2 Freeman's Reports of Cases in Law and Equity, 210; and afterwards in Fisher and Forbes, referred to in 9 Viner, 373, pl. 82. And according to 9 Viner, 372, pl. 77, "hops growing out of old roots shall go to the executor or administrator, because they grow by the manurance and industry of the owner, and so are emblements."

The same law is declared in 3 Bacon's Ab. tit. Ex'rs and Adm'rs, (h), p. 493. And such is the statement of several other authors

who undertake to give the rule as it was understood to exist in England prior to our revolution. Most of these authors refer to the case of Latham v. Atwood as authority. The reason of the rule, as stated in the report of that case, is that "they (hops) be such things as grow by manurance and industry of the owner, by the making of hills and setting poles." The plaintiff's counsel have also referred to some late English decisions which, without deciding the question, recognize the law as laid down by the court in Latham v. Atwood. (See Evans v. Roberts, 5 B. & C. 829, and Graves v. Weld, 5 B. & Ad. 105.)

The reason given by the court in Latham v. Atwood for holding hops to be personal instead of real estate, is very satisfactory. It is well known that the value of the crop depends in a very great measure—almost entirely—upon the "manurance and industry of the owner;" and like other annual crops, which depended upon yearly cultivation, should go to enhance the personal estate.

The defendant's counsel has submitted a very ingenious argument, the principal point of which is to show that hops are natural products of the earth; and as such, real estate, like growing trees, grass, and fruit. As an original question his argument would be very satisfactory to prove that strawberries and grapes, as now cultivated, grow by the same "manurance and industry of the owner," as hops, and should be put in the same category; although the result would be that they too ought to be treated as personal instead of real estate.

The decisions are not uniform as to the rule which should distinguish between real and personal property, within the meaning of the statute of frauds. In some cases it is held that grass is personal property, if sold in prospect of separation from the freehold. (Roberts on Frauds, 126.) But the majority of the cases hold that if the subject grows spontaneously, without cultivation, or annual cultivation, it is a part of the realty. (6 East 602; 1 Barb. 542; 1 Denio 550; 6 Gill & J. 188.) Such undoubtedly were the views of the revisers when they recommended the legislature to enact the provisions contained in the revised statutes, declaring the following, among other things, to be assets, viz.: "Crops growing on the land of the deceased at the time of his death," and "any kind of produce raised annually by labor and cultivation, except grass growing or fruit not gathered." (2 R. S. 83, Par. 5, 6.) They state that their object was "to enumerate those articles which are likely to occasion doubt, to settle some disputed cases, and yet to include everything which ought to be

included, by the use of general terms, to protect the heir." (3 R. S. 2d ed., p. 639.) It will readily be seen that the rule must be more or less arbitrary in relation to fruit, as much of it is grown by great annual labor, while some of it requires cultivation. The rule can hardly be made to change, so to meet the varying changes which occur in the cultivation of these natural productions. As the value of the hop depends so essentially upon manurance and annual cultivation, there is no reason why it should be taken out of the category of "produce raised annually by labor and cultivation," by any new interpretation of the statute of frauds. It would be more just to the rights of parties to take certain varieties of fruits from the statute definition and call them assets; as their value and quantity depend almost altogether upon manurance and annual cultivation; especially the grape and strawberry. It requires but little soil to raise them, and in other respects they are produced by personal labor and at the expense of the personal rather than of the real estate of the owner. And to produce uniformity and prevent confusion, these various productions of the soil should, if consistent with the decisions of the courts in other cases, be treated as real or personal property, whether the question arises between the heir and executor, or between the debtor and creditor, or within the definition of the statute of frauds. The statute being silent as to hops, we must decide this question upon authority independent of the statute. I have already referred to the English decisions, which put them in the category of personal property, and the reasons which influenced the court in coming to that conclusion. And I have expressed my satisfaction with the reasons as given in the original case of Latham v. Atwood (Croke Charles, 515). The defendant's counsel has, by great research, found several cases which he thinks overrule the decision of the court in Latham v. Atwood. The first case cited by him is Woddington v. Bristow (2 Bos. & P. 452). But the hops which were the subject of the contract in that case were not yet growing upon the vines. They were not *in esse* at the time the contract was made, and therefore not the subject of sale. And such is the statement of the case by the judges. The case of Latham v. Atwood was not even alluded to. The case of Emmerson v. Heelis (2 Taunton 38) is more to the point. That was a sale of turnips in the ground, and the court held that it was a sale of an interest in land and must be in writing. Mansfield, Ch. J., said he could not distinguish it from the case of hops. But the case does not profess to overrule Latham v. Atwood, and the decision is wholly irreconcilable with subsequent

English cases and the decisions of our own courts, without exception, so far as they have come under my observation. The decision of the court in Parker v. Standard (11 East 362), Crosby v. Wadsworth (6 id. 602), S. C. (2 Smith 559), approve of the case of Woddington v. Bristow (2 Bos. & Pul. 452), but upon grounds which, at the present day, are not regarded as authority. (See Green v. Armstrong, 1 Denio 550, 555, 6; Mumford v. Whitney, 15 Wend. 380, 386, 7.) The case of Woddington v. Bristow was again under review in the English courts in Jones v. Flint (10 Ad. & El. 753, 759), and it was said by the judge (Lord Denman, Ch. J), who delivered the opinion of the court, that it was "very difficult to reconcile all the cases, and still more so all the *dicta* on the subject, from the case of Woddington v. Bristow to the present time, and we are therefore left at liberty to abide by a general principle." The judge observed: "We agree that the safer grounds of decision are the legal character of the principal subject matter of sale, and the consideration whether in order to effectuate the intentions of the parties, it be necessary to give the vendee an interest in the land." And he refers with approval to the case of Evans v. Roberts (5 B. & C. 829, 837, 840), where Littledale, J., says: "I think a sale of any growing produce of the earth (reared by labor and expense) in actual existence at the time of the contract, whether it be in a state of maturity or not, is not to be considered a sale of an interest in or concerning land, within the meaning of the 4th section of the statute of frauds." It was held in Jones v. Flint that corn and potatoes were goods and chattels within the meaning of the statute of frauds, and for the reason that they are *fructus industriales,* while grass is not. (Id., p. 758.) This is the same reason given in Latham v. Atwood for holding that hops growing and maturing on the vines are chattels personal and not chattels real.

In my opinion, therefore, hops, growing and maturing on the vines, which are produced by annual cultivation and the industry of the owner, are personal chattels within the meaning of the statute of frauds, and as such subject to sale like other personal property.

A new trial should be granted; costs to abide the event.

New trial granted.[26]

[26] Trees reared in nursery ground, expressly for sale as merchandise, usually regarded as personalty. Hamilton v. Austin et al., 36 Hun. (N. Y.) 139 (43 N. Y. Supp. 139).

See Childs' Personal Property, § 27.

ICE.

WASHINGTON ICE COMPANY v. SHORTALL.

101 Ill. 46, 40 Am. Rep. 196. 1881.

The facts are stated in the opinion.

MR. JUSTICE SHELDON—This was an action of trespass *quare clausum fregit,* brought in the Circuit Court of Cook county by Shortall, against the Washington Ice Company, for cutting, removing and appropriating, in January and February, 1879, a quantity of ice which had formed over the bed of the Calumet river, within the limits of plaintiff's land, in Cook county. Defendant pleaded the general issue, and *liberum tenementum.* A verdict and judgment were rendered in favor of plaintiff for $562.40, which judgment, on appeal to the Appellate Court for the First District, was affirmed, and defendant appealed to this court.

On the trial, the patent from the United States to Lafrombois and Decant was introduced in evidence, showing that there was no restriction or reservation by the government, and that the *locus in quo* was embraced in the 125 31/100 acres the patent conveyed. Under this patent plaintiff derived title.

From the evidence it appears that the call of 125 31/100 acres contained in the patent required that the bed of the river should be included to make that quantity; that the Calumet river, extending from Lake Michigan westward past the plaintiff's premises, where it is between 165 and 200 feet wide, is in fact a navigable river; that the defendant company owned ice-houses on its own property on the next lot east of plaintiff's, and that in operating on the ice it did not go on the plaintiff's land, save as it entered upon the ice; that it first gathered the ice in front of its own land from the river, and then commenced to take the ice opposite the plaintiff's premises.

The court, at plaintiff's request, instructed the jury that the plaintiff was the owner of the whole bed of the river flowing through his premises; that when the water became congealed, the ice attaching to the soil constituted a part thereof, and belonged to the owner of the bed of the stream, and that he could maintain trespass for the wrongful entry and taking the ice; and that the measure of damages, in case of a finding for plaintiff, would be the value of the ice as soon as it existed as a chattel—that is, as

soon as it had been scraped, plowed, sawed, cut and severed, and ready for removal. * * *

It may be well to inquire, first, whether plaintiff, as riparian proprietor on both sides of the Calumet river, is the owner of the bed of the stream within the limits of his land. By the common law, only arms of the sea, and streams where the tide ebbs and flows, are regarded navigable. The stream above the tide, although it may be navigable in fact, belongs to the riparian proprietors on each side of it to its centre, and the only right the public has therein is an easement for the purpose of navigation. * * *

This rule of the common law has been adopted in this State, and is here the settled doctrine. It was so held in Middleton v. Pritchard, 3 Scam. 510, and Houck v. Yates, 82 Ill. 179, with regard to the Mississippi river where it bounds this State; in Braxon v. Bressler, 64 Ill. 488, as to Rock river; City of Chicago v. Laflin, 49 Ill. 172, and City of Chicago v. McGinn, 51 Ill. 266, in regard to the Chicago river.

The Calumet river then being non-tidal, and plaintiff owning lands on both sides of it, he is the owner of the whole of the bed of the stream to the extent of the length of his lands upon it.

The next question respects the ownership of ice formed over the bed of the river passing through the land. It is objected by defendant that water in a running stream is not the property of any man,—that no proprietor has a property in the water itself, but a simple usufruct while it passes along; but manifestly different considerations apply to water in a running stream when in a liquid state and when frozen.

In Agawam Canal Co. v. Edwards, 36 Conn. 497, it is said: "The principle contained in the maxim, '*cujus est solum ejus est usque ad cœlum,*' gives to a riparian owner an interest in a stream which runs over his land. But it is not a title to the water,—it is a usufruct merely,—a right to use it while passing over the land. The same right pertains to the land of every other riparian proprietor on the same stream and its tributaries; and as each has a similar and equal usufructuary right, the common interest requires that the right should be exercised and enjoyed by each in such a reasonable manner as not to injure unnecessarily the right of any other owner, above or below."

It will thus be seen that the riparian owner, as such, has rights with respect to water in a running stream,—he has a right of use, which right authorizes the actual taking of a reasonable quantity of the water for his purposes. The limitation in extent of the use

of the water is, that it shall not interfere with the public right of navigation, nor in a substantial degree diminish and impair the right of use of the water by a lower or upper proprietor as it passes along his land. The only opposing rights are such rights of the public, and such upper and lower proprietors. But when the water becomes congealed, and is in that state, these opposite rights are in nowise concerned. The ice may be used and appropriated without detriment to the right of navigation by the public, or to other riparian owners' right of use of the water of the stream when flowing over their land. The just and reasonable use of the water which belongs to the riparian proprietor would be, in such case of congealed state of the water, the unlimited use and appropriation of the ice by him, as it would be no interference with rights of others. We are of opinion there is such latter right of use, and that it should be held property, of which the riparian owner can not be deprived by a mere wrongdoer. When water has congealed and become attached to the soil, why should it not, like any other accession, be considered part of the realty? Wherein, in this regard, should the addition of ice formed over the bed of a stream be viewed differently from alluvion, which is the addition made to land by the washing of the sea or rivers? And we do not perceive why there is not as much reason to allow to the riparian owner the same right to take ice as to take fish, which latter is an exclusive right in such owner.

Ice, from its general use, has come to be a merchantable commodity of value, and the traffic in it a quite important business. It would not be in the interest of peace and good order, nor consistent with legal policy, that such an article should be held a thing of common right, and be left the subject of general scramble, leading to acts of force and violence. * * *

The views we hold are in accordance with the holding in The State v. Pottmeyer, 33 Ind. 402, that when the water of a flowing stream running in its natural channel is congealed, the ice attached to the soil constitutes a part of the land, and belongs to the owner of the bed of the stream, and he has the right to prevent its removal. See further, relative to the subject, Myer v. Whitaker, 55 How. Pr. Rep. 376; Lorman v. Benson, 8 Mich. 18; Mill River Woolen Manufacturing Co. v. Smith, 34 Conn. 462; Brown v. Brown, 30 N. Y. 519.

Defendant claims that it committed no trespass in taking the ice, because the ice in the midst of a stream navigable in fact, is naturally an obstruction to navigation, and that any one has the right, having obtained access independent of the riparian owner,

to enter upon the ice and remove it. We said in Braxon v. Bressler, above cited: "Where the river is navigable, the public have an easement or a right of passage upon it as a highway, but not the right to remove the rock, gravel or soil, except as necessary to the enjoyment of the easement." The same is to be said as to the ice here. But it was not removed as necessary for the enjoyment of the public easement of navigation,—it was for the purpose only of the appropriation of it for defendant's gain.

Perceiving no error in the giving or refusing of instructions by the circuit court, the judgment of the appellate court is affirmed.

Judgment affirmed.[27]

HIGGINS v. KUSTERER.

41 Mich. 318, 2 N. W. 13. 1879.

The facts are stated in the opinion.

CAMPBELL, C. J.—Higgins recovered below a judgment against Kusterer for the value of a quantity of ice. Kusterer claims that title never passed to Higgins, and that the property was lawfully acquired by himself from one Loder, who cut it on a pond belonging to one Coats and sold it to defendant.

The facts are briefly these: The ice in question was formed upon water which had spread over a spot of low ground partly belonging to Hendrick Coats, forming a basin, the land being dry in summer, and in the rest of the year overflowed from a small brook leading into it. After the ice formed, and in February, 1878, Coats, by a parol bargain, sold all the ice in his part of the basin to Higgins, for fifty cents. The parties at the time stood near by, in view of the ice, and the quantity sold was pointed out, and the money paid. The ice was then all uncut.

About two weeks thereafter John Loder, knowing that Higgins had purchased and claimed the ice, and having been warned thereof by Coats, offered Coats five dollars for the ice, which Coats accepted, and Loder cut it and sold it to Kusterer, who had made a previous verbal contract with Loder for it. Higgins was present when the ice was loaded on Kusterer's sleigh, and forbade the loading and removal, on the ground that he had purchased it from Coats.

[27] See Childs' Personal Property, § 30.

Kusterer referred the matter to Coats, who said he had sold it to Loder.

The only question presented is whether Higgins was owner of the ice.

The case was argued very ably and very fully, and the whole subject of the nature of ice as property was discussed in all its bearings. We do not, however, propose to consider any question not arising in the case.

The record is free from any complications which might arise under the circumstances. There are no conflicting purchasers in good faith without notice. Loder and Kusterer had full notice of the claims of Higgins before they expended any money. The sale to Higgins was not a sale of such ice as might from time to time be formed on the pond, but of ice which was there already, and which if not cut would disappear with the coming of mild weather and have no further existence. It was not like crops or fruit connected with the soil by roots or trees, through which they gained nourishment before maturity. It was only the product of running water, a portion of which became fixed by freezing, and if not removed in that condition would lose its identity by melting. In its frozen condition it drew nothing from the land, and got no more support from it than a log floating on the water would have had.

Its only value consists in its disposable quality as capable of removal from the water while solid, and of storage where it might be kept in its solid state, which could not be preserved without such removal. If left where it was found it would disappear entirely.

While we think there can be no doubt that the original title to ice must be in the possessor of the water where it is formed, and while it would pass with that possession, yet it seems absurd to hold that a production which can have no use or value except as it is taken away from the water, and which may at any time be removed from the freehold by the moving of the water, or lose existence entirely by melting, should be classed as realty instead of personalty, when the owner of the freehold chooses to sell it by itself. When once severed no skill can join it again to the realty. It has no more organic connection with the estate than anything else that floats upon the water. Any breakage may sweep it down the stream and thus cut off the property of the freeholder. It has less prominence than any crop that is raised upon the land, and its detention in any particular spot is liable to be broken by many accidents. It must be gathered while fixed in place, or not at all, and can only be kept in existence by cold weather. In the present

case the peculiar situation of the pond rendered it likely that the ice could not float away until nearly destroyed, but it could not be preserved from the other risks and incidents of its precarious existence. Any storm or shock might in a moment convert it into floating masses which no ingenuity of black-letter metaphysics could annex to the freehold.

It does not seem to us that it would be profitable to attempt to determine such a case as the present by applying the inconsistent and sometimes almost whimsical rules that have been devised concerning the legal character of crops and emblements. Ice has not been much dealt with as property until very modern times, and no settled body of legal rules has been agreed upon concerning it. So far as the principles of the common law go, they usually, if not universally, treated nothing movable as realty unless either permanently or organically connected with the land. The tendency of modern authority, especially in regard to modern fixtures, has been to treat such property according to its purposes and uses, as far as possible.

The ephemeral character of ice renders it incapable of any permanent or beneficial use as part of the soil, and it is only valuable when removed from its original place. Its connection, if its position in the water can be called a connection, is neither organic nor lasting. Its removal or disappearance can take nothing from the land. It can only be used and sold as personalty, and its only use tends to its immediate destruction. We think that it should be dealt with in law according to its uses in fact, and that any sale of ice ready formed, as a distinct commodity, should be held a sale of personalty, whether in the water or out of the water.

We shall not attempt to discuss cases where the bargain includes future uses of land and water, and interests in ice not yet frozen. Whether such dealings are to be regarded as leases, or licenses, or executory sales, may be properly discussed when they occur. We think the sale in the present case was rightly held to be a sale of personalty. The judgment must be affirmed, with costs.

(The other justices concurred.)[28]

[28] See Childs' Personal Property, § 30.

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BIGELOW v. SHAW et al.

65 Mich. 341, 32 N. W. 800. 1887.

The facts are stated in the opinion.

MORSE, J.—This action was brought in justice's court to recover damages against the defendants for entering upon a frozen mill-pond upon her lands, and cutting and removing ice during the winter of 1884 and 1885. The defendants gave notice that the title to the land would come in question, and filed the bond required by the statute in such case. Thereupon the justice certified the cause to the circuit court for the county of Mecosta, where a trial was had, and judgment rendered for the plaintiff for the sum of $50.

The circuit judge, Hon. C. C. FULLER, filed a written finding of the facts upon which he based his judgment. This finding shows that the defendants, under a lease from Edward P. Shankwiler and David L. Garling, went upon that portion of a mill-pond which set back upon defendant's lands, and cut and carried away and disposed of for their own use 200 cords of ice, the value of which, as it lay in the pond, was $50. The mill-pond was formed by building a dam across Ryan creek, a small stream, not meandered and emptying into the Muskegon river. The dam was built in 1866 by John Bigelow, the husband of the plaintiff. He then owned the N. W. ¼ of the N. W. ¼, and the N. E. ¼ of the N. W. ¼, and lot number 2, of section 24, and the S. E. ¼ of the S. W. ¼ of section 13, all in township 15 N., of range 10 W., in the county of Mecosta, Michigan. Ryan creek entered these lands on section 13, and ran through both the N. E. and the N. W. quarters of the N. W. ¼ of 24. Bigelow erected this dam for the purpose of ponding the water to obtain power to run and operate a flouring-mill on section 24. In 1873 the plaintiff joined in a mortgage with her husband, executed by him to the Albion College Endowment Fund Company, upon the N. E. ¼ of the N. W. ¼, and said lot 2, of section 24. This mortgage also conveyed the right of flowage to raise the water in the flume at the mill 10 feet head, on the said lands retained by Bigelow, and not embraced in the mortgage, situated on sections 24 and 13. This mortgage was afterwards foreclosed, and the title to the lands, and the right of flowage, therein described, were acquired by said Shankwiler and Garling, under whom defendants claim the ice. Bigelow also, before the commencement of this suit,

conveyed to his wife, the plaintiff, subject to the aforesaid right of flowage, a certain portion of the N. W. ¼ of the N. W. ¼ of section 24, and the same premises upon which the ice was cut by defendants. The plaintiff, therefore, at the time of the cutting of the ice, owned the land under said ice, and the defendant's lessors owned the right to flow water upon said land. * * *

We think the circuit judge was right in his conclusion of law that the ice belonged to the plaintiff. Shankwiler and Garling, in acquiring title under the mortgage to the Albion College Endowment Fund Company, did not obtain any title in the land flowed, or in the water itself, but a mere right to raise the water to a certain head at the flume, and thereby overflow the land. While the proprietor of the soil thus overflowed could not draw this water off by drains or canals, so as to injure the use of the same by the mill-owners, he would have beyond question the right to use it for watering his cattle, or irrigating his lands for domestic purposes, and for any reasonable profit or advantage which did not, in a perceptible and substantial degree, impair the operation of the flouring-mill. And the almost uniform authority is that he may take and carry away the water, when formed into ice, provided he does not thereby appreciably diminish the head of water at the dam of the mill-owner. * * *

The owner of the soil under the water is ordinarily the sole and exclusive owner of the ice forming upon such water. And this is not confined to ponds, forming or being entirely upon a person's premises, but his riparian ownership of the bed of the stream will carry with it the right to the ice forming upon the surface of such stream, as far as his riparian right to the soil extends. Lorman v. Benson, 8 Mich. 18; People's Ice Co. v. The Excelsior, 44 Mich. 229, 6 N. W. Rep. 636; Washington Ice Co. v. Shortall, 101 Ill. 46; Village of Brooklyn v. Smith, 104 Ill. 429. * * *

It is contended by the counsel for the defendant that this court held in Higgins v. Kusterer, 41 Mich. 318, 2 N. W. Rep. 13, that ice was personal property, and belonged to the possessor of the water, and that in the case before us the possession of the water where this ice was cut was in Shankwiler and Garling; that they could control this overflow at will, and without such overflow no ice could be produced. * * * We do not consider that the case of Higgins v. Kusterer is at all opposed to the authorities heretofore cited. It was simply decided in that case that, where the owner of the freehold upon which the ice had gathered chose to sell the ice by itself, it ought, for good reasons, some of which are stated

in the opinion, to be classed as personalty instead of realty. The ownership of the ice in that case was held to be in the person possessing the water, but his possession of the water was derived solely from his ownership of the soil under the pond which contained such water. The term "possessor of this water," as used in the opinion, means the owner of the water. In the case at bar no one had the exclusive possession or ownership of the water as before shown. It was in a stream in which others had rights as well as the plaintiff and the mill-owners. The use and possession of the waters of Ryan creek by either must be subject at all times to the rights of other proprietors of its banks and bed, both above and below them, from its source to its end. Shankwiler and Garling had no such possession of the water as would give them any absolute ownership therein. They acquired by their title to the mill, under the mortgage foreclosure, only the right to use the water for mill purposes, and to overflow the plaintiff's land if they saw fit. * * *

If Shankwiler and Garling saw fit to use the overflow, as they did, then plaintiff would have a right to the ice upon the overflow by the same rule and principle that would give it to her in the channel of the creek. The ice forming upon the waters of the stream where it ran through the plaintiff's premises without any overflow by the dam, would belong to her by reason of her proprietorship of the soil, although the waters of such creek could not be diverted by her to the injury of the owners of the stream below her. Upon the same principle the ownership of the soil beneath the overflow would endow her with the exclusive property in the ice upon such overflow. * * *

The judgment of the court below is affirmed, with costs.

(The other justices concurred.)[29]

MANURE.

Landlord and Tenant.

Usual Course of Husbandry.

LEWIS v. JONES.

17 Pa. St. 262, 55 Am. Dec. 550. 1851.

[This was an action to recover damages for carrying away thirty loads of manure. Jones owned twenty acres of land which he leased

[29] See Childs' Personal Property, § 30.

to Lewis. Lewis kept cows and pastured them on the place. He also kept eight or nine horses. Evidence was introduced to show that Lewis had bought "some" hay and "some" grain which he fed to his stock, but how much was not determined. Lewis left the farm in April, and just previous to his leaving, removed the manure in question, which was piled in heaps in the barnyard. Judgment for plaintiff and defendant appealed.]

LEWIS, J.— * * * It appears by the record, that two questions of importance to the agricultural interest of the country have been decided by the court of common pleas; and we therefore proceed to inquire whether any error has been committed in their solution.

The court instructed the jury that if they believed "that the defendant was the tenant of the plaintiff, and rented the land of him *for farming purposes,* and the manure was made upon the land in the ordinary course of farming, and was heaped up in the yard, and the defendant, about the time his lease was to expire, took the manure (now the subject of controversy) and hauled it away without the consent of the plaintiff, when there was no authority given by the lease for him to do so, this action can be sustained, and the plaintiff will be entitled to recover the value of the manure that was in this manner taken and carried away."

It is implied from the letting of a farm for agricultural purposes that the tenant will cultivate the land according to the rules of good husbandry. This is as much a part of the contract as that he shall deliver up possession at the end of the term, or that he shall do no waste. If the manure which is made by the feeding and bedding of his stock on the premises, according to the usual course of husbandry, is to be disposed of and carried to another farm, it only creates a necessity for the purchase of other fertilizing materials, to keep the land in good order for the production of crops. This must be done at expense of money in the purchase, and time and labor in hauling it from a distance. If every tenant were to adopt the practice of selling old manure, much time and labor would be unnecessarily expended in transporting it from place to place, when, for all general purposes, the interests of landlord and tenant would be much better promoted by the application of the manure to the farm on which it was made. But a large proportion of farms are owned by widows and orphan children, and are necessarily in the occupancy of tenants from year to year. These, which should be under the peculiar protection of the law, would be most exposed to impoverishment.

Tenants for short or uncertain periods, under the temptation of a rule of law which encourages bad husbandry, would be led into practices (each in self-protection), which no one would adopt with regard to his own land. Such a tenant would feel no interest whatever in preserving the fertility of the soil for the benefit of those who might succeed him. * * * It is manifest that such a course of husbandry would be injurious to the public interests, and ruinous alike to landlords and tenants.

The justice of this view of the question has been recognized by enlightened jurists in England and in other states of this Union. Mr. Justice Buller laid down the doctrine that "every tenant (where no particular agreement existed dispensing with these engagements) is bound to cultivate his farm in a husband-like manner, and to consume the produce on it. This is one engagement that arises out of the letting, and which the tenant cannot dispense with, unless by special agreement." This language of Mr. Justice Buller was cited by Chief Justice Gibbs, in the case of Brown v. Crump, determined in 1815. 1 Marsh. 567.

In Connecticut, it has been held that manure spread upon the land, or scattered about a barn-yard, cannot be taken away by the vendor. Parsons v. Camp, 11 Conn. 530.

In Massachusetts, Chief Justice Shaw, in delivering the opinion of the court, declared that "manure made on a farm, occupied by a tenant at will or for years in the ordinary course of husbandry, consisting of the collections from the stable and barn-yard, or of composts formed by an admixture of these with the soil, or other substances, is, by usage, practice, and the general understanding, so attached to and connected with the realty, that in the absence of any express stipulation on the subject, an outgoing tenant has no right to remove the manure thus collected, or to sell it to be removed; and that such removal is a tort for which the landlord may have redress." The tenant has a qualified possession of such manure for a special purpose only; that is, to be used upon the farm. The moment he sold it, the act was an abandonment of the special purpose, and it vested in the landlord as owner of the freehold, and the action of trespass lies for removing it. Daniels v. Pond, 21 Pick. 371.

In the State of Maine, Chief Justice Mellen declared that the claim of the tenant to remove the manure made upon the premises, "*even if made by his own cattle and with his own fodder*, had no foundation in justice or reason, and such a claim the laws of the land cannot sanction." Lassell v. Reed, 6 Greenleaf 222.

In the State of New York, Chancellor Kent states that "the policy of encouraging and protecting agricultural improvements, will not permit the outgoing tenant to remove the manure which has accumulated upon a farm during the course of his term." 2 Kent's Com. 347. And Chief Justice Nelson, of the same state (now on the bench of the Supreme Court of the United States), after reviewing the authorities and examining the question upon principle, declares that where a farm is let for agricultural purposes (no custom or stipulation in the case), the manure does not belong to the tenant, but to the farm; and the tenant has no more right to dispose of it to others, or remove it himself from the premises, than he has to dispose of or remove a fixture." "If a farm be leased for agricultural purposes, good husbandry (which without any stipulation is implied by law), would undoubtedly require it to be left on the premises." Middlebrook v. Corwin, 15 Wend. 171.

There are other authorities upon this question; but enough has been said to show that the charge of the court below was correct, so far as it relates to the manure made from the produce of the farm.

The doctrine that the manure goes with the land, is of course confined to farms which are let for agricultural purposes; and the case before us is one of that character, in which the manure was made from the produce of the farm.

One of the witnesses, however, testified that the tenant "bought *some hay*"—the witness did not know how much—"and *some grain* to feed his horses and cows. He fed the horses on the grain that was bought." * * * *"Some"* is a term too uncertain in its signification to sustain a verdict for any definite amount. It may mean a single ounce, or ten thousand tons—a single quart, or twenty thousand bushels.

But where a farm is let for agricultural purposes, the tenant cannot justify the removal of any portion of the manure made on the premises, by occasionally employing his teams in business not connected with the cultivation of the soil, and supplying them in part with hay and grain purchased from others, so long as the manure thus made is commingled with that made from the produce of the farm. It is probable that in such a case, the land would lose as much during the absence of the teams on the road, as it would gain by the foreign admixture. * * *

It is ordered that the judgment of the court below be affirmed.

Judgment affirmed.[30]

[30] See Childs' Personal Property, § 31.

NOT IN USUAL COURSE OF HUSBANDRY.

COLLIER v. JENKS.

19 R. I. 137, 32 Atl. 208. 1895.

The facts are stated in the opinion.

MATTESON, C. J.—This is an exception to the decision of the District Court of the Sixth Judicial District in an action of trespass *de bonis asportatis* for breaking and entering the plaintiff's close and taking and carrying away and converting to the defendant's use a quantity of manure. It was admitted at the trial that the manure, amounting to about nine cords, was made on the farm of the defendant's wife; that it had been hauled out of the barn yard and piled on a lot containing about seven-eighths of an acre, which, subsequently, on December 23, 1893, was conveyed by the defendant and his wife to the plaintiff. The defendant offered evidence tending to prove an oral reservation of the manure in the following spring. The court excluded the evidence on the ground that the manure was appurtenant to the land on which it was piled and passed under the deed of it to the plaintiff; and that no oral reservation was effectual to retain title to the manure. * * *

Manure made on the farm in the usual course of husbandry is so far regarded as an incident of the realty or appurtenant to it that, in the absence of any agreement concerning it, it will pass under a deed of the farm. The rule is one of policy, designed to promote the interests of agriculture. We see no reason for its application when the sale is, not of the farm, but only of a small parcel of land off the farm on which the manure happens to be piled. *Cessante ratione, lex ipsa cessat.* There is nothing in the nature of manure prior to its actual incorporation with the soil which makes it necessary to regard it as a part of the realty. It may be sold by the owner of a farm separately from the land. Such a sale amounts to a severance of it from the land and constitutes it personal estate; French v. Freeman, 43 Vt. 94; or it may be the subject of an oral reservation prior to or contemporaneous with a conveyance of the land and thereby become personal estate; Strong v. Doyle, 110 Mass. 92. Manure made in livery stables, or in barns not connected with farms, or otherwise than in the usual course of husbandry, forms no part of the realty

on which it may be piled, but is regarded as personal estate. Needham v. Allison, 4 Foster 355; Daniels v. Pond, 21 Pick. 367; Lassell v. Reed, 6 Greenl. 222; Parsons v. Camp, 11 Conn. 525.

The conveyance to the plaintiff having been, not of the farm, but only of a lot of seven-eighths of an acre, we are of the opinion that the manure did not form a part of the land conveyed because it happened to be piled on it at the time of the conveyance; and, hence, that the court below erred in awarding the value of the manure to the plaintiff.

Exception sustained and case remitted to the District Court of the Sixth Judicial District for a new trial.[31]

VENDOR AND VENDEE.

ELTING v. PALEN.

60 Hun. (N. Y.) 306, 14 N. Y. Supp. 607. 1891.

The facts are stated in the opinion.

LEARNED, P. J.—The defendant occupied as tenant a farm of some 300 acres, and his lease expired April 1, 1887. A partition sale of the premises was had October 14, 1886, at which the plaintiff bought 45 acres, which contained the barn and dwelling-house. Other persons bought other parcels; among them Mrs. Varick bought about 47 acres. The terms of sale as to all the land stated that it was sold "subject to the rights of Calvin Palen as tenant, and the possession of said premises will be reserved until April 1, 1887, and also the winter grain sown thereon will be reserved, and the right of the tenant of coming upon said premises after April 1, 1887, and gathering the same." On the farm—not on the part bought by the plaintiff—was also another barn, used for storing hay. At the time of the purchase by plaintiff there were two or three loads of manure in the yard of the barn, bought by him. On the 17th of February following the time of the commencement of this action there were 130. Just prior to the commencement of this action the defendant began carting away his manure from the plaintiff's barn-yard, and depositing it on that part of the farm purchased by Mrs. Varick. This he did at her request. He had carted away about 13 loads. Thereupon the plaintiff

[31] See Childs' Personal Property, § 31.

commenced this action, and obtained an injunction *pendente lite,* forbidding the defendant from carting away any more manure. On the trial this injunction was made final, and from the judgment the defendant appeals.

It does not distinctly appear whose tenant the defendant had been,—probably the tenant of the deceased owner. * * * The terms of sale reserve only the possession. It would seem, then, that the title passed to the several purchasers at the time they received their deeds; but that, owing to the defendant's existing lease, they could not take actual possession. The terms of the sale seem to have been intended simply to protect the rights of defendant as tenant, and to prevent any claim by the several purchasers that the contract of sale was broken by their inability to turn the defendant out of possession. The several purchasers, therefore, becoming owners of their several parcels, must have acquired severally the rights towards the defendant which a land-owner would have in respect to a tenant under such circumstances, and these several purchasers were not co-tenants or joint tenants. They held their respective purchases in severalty. If the defendant's lease had continued for another year, then it is very probable that in the ordinary course of good husbandry he could have spread this manure upon any proper part of the farm, because the annual spreading of the manure is the ordinary mode. He would have been entitled to have, by this mode of use, the benefit of the accumulated manure. But his lease was to expire April 1st. His carting this manure to a part of the farm bought, not by the plaintiff, but by some other person, was the same as if he had carted it to some land which had never been part of the farm. The previous owners of the farm had by the partition sale divided it, and each purchaser held his purchase separately. In Middlebrook v. Corwin, 15 Wend. 169, the landlord sued the tenant for manure taken away from the farm shortly before the expiration of the term, and it was held that he could recover. The court said the manure belonged to the farm, and the tenant had no more right to remove it than he had to remove a fixture. Such is the rule in 2 Kent, Comm. 347. In Goodrich v. Jones, 2 Hill 142, the court held that manure made a part of the freehold, though laid up in heaps in the barn-yard. This was said to be the doctrine between landlord and tenant, and to be stronger as between vendor and vendee. The same is held in Daniels v. Pond, 21 Pick. 367; and Kittredge v. Woods, 3 N. H. 503, which last case is approved in Goodrich v. Jones, *supra.* See, also, Lassell v. Reed, 6 Greenl.

222. It is worth noting, also, that this is a rule not of law only. By the Roman law, manure went to the purchaser of the farm, whether the manure was in a heap or in a stable. *Fundo vendito vel legato sterculinum et stramenta emtoris et legatoris sunt et ne interest in stabulo jaceat an acervus sit.* Dig. XIX, 117, 2. See, also, Dig. XLIII, 24, 7, 6. It is urged by the defendant that this manure was not in existence when the plaintiff purchased, but was made subsequently. Then, as we have above seen, the defendant was after the purchase in the position of tenant to the plaintiff; and the rule is equally applicable in that relation. In regard to the case cited by defendant of Ruckman v. Outwater, 28 N. J. Law 581, holding the manure in a barn-yard does not pass to the grantee, we can only say that it is contrary to the decisions of our state above cited, and, however well considered, we cannot follow it. The defendant urges the rights of co-tenants or joint tenants as to personal property; but we think that those rights are not here involved. Of course there is a certain difficulty in treating such an article as manure in a farm barn-yard as real estate; but the difficulty is no greater than in the case of hop-poles (Bishop v. Bishop, 11 N. Y. 123); and the rights of all parties seem to be best settled when the manure is said to belong to the farm, and not to the tenant. Nor do we think that any difficulty arises from the fact that the tenant's lease extended over the whole 300 acres. He had no right to the manure as owner, though he might, as above stated, have restored it to the land; and when the owners of the land divided it by their sale, we see no injustice in saying that the manure belonged to that separate portion of the farm on which it was accumulated; for, as above pointed out, it could not, in good husbandry, during what remained of the defendant's term, have been applied for his benefit over the farm generally.

Judgment affirmed, with costs.[32]

RUCKMAN v. OUTWATER.

28 (4 Dutcher) N. Jer. Law 581. 1860.

The facts are stated in the opinion.

HAINES, J.—To an action of assumpsit, the plaintiff in error, who was the defendant below, pleaded payment with a notice of

[32] See Childs' Personal Property, § 31.

set-off, in which he charged the plaintiff below with a quantity of manure sold and delivered. To sustain this charge, he gave in evidence a deed of conveyance, from the plaintiff to him, of a farm, in the county of Bergen, containing no exception or reservation of manure or of fixtures. And he further proved that the plaintiff, by his consent, remained in the possession of the premises after the execution of the deed, and that, while he continued in such possession, the plaintiff took and carted away the manure, which was lying in and spread over the barn-yard, and not in heaps, at the time of the sale and conveyance of the farm.

The court was requested to charge the jury that the manure so lying in the barn-yard, and not in heaps at the time of the sale and conveyance of the farm, if not reserved by the vendor, passed by the deed with and as a part of the farm. The court refused so to charge, but instructed the jury, in effect, that the title to the manure did not pass by the deed, and that the defendant, as purchaser of the farm, could not claim as of right the manure that had accumulated in the barn-yard. On this the error is assigned, and the judgment sought to be reversed.

The question thus presented is, whether, by the deed of conveyance of a tract of land without any clause of reservation, the title to the manure lying in and around the barn-yard, where it had accumulated, passed to the grantee.

By an ordinary deed of conveyance of land nothing passes to the grantee but the real estate and its appurtenances, and whatsoever is so attached or affixed to it, that it cannot be removed without injury to the freehold. Hence the question arises, whether manure so lying in a barn-yard is a part of the real estate, or an appurtenant to it, or so attached to the freehold that it passes with it by virtue of the deed of conveyance.

The question is not to be determined by the rules of law regulating fixtures, for the property in question is in no respect a fixture, an article of a personal nature affixed to the freehold, and which cannot be removed without injury to it, nor is it claimed as such. It is claimed as a part of the freehold itself, an appurtenant to it, and which, for the sake of agriculture and good husbandry, should not be removed.

But, as between the grantor and grantee, I can discover no reason, nor can I find any satisfactory authority for such claim. Manure in the yard is as much personal property as the animals and the litter from which it is produced; as much so as the grain in the barn or the stacks of hay in the meadow. And it is not material

whether it lies up in heaps or scattered around the yard; whether as thrown from the doors or windows of the stable, or where it accumulated from the droppings of the cattle. But when it is spread upon the land, and appropriated to it for fertilizing purposes, then, and not until then, does it become a part of the freehold. Posts and rails, designed for the farm, are personal property so long as they remain in piles or otherwise unappropriated; but as soon as they are converted into fence they become a part of the freehold affixed to it, so as to lose the character of personalty.

As well may the timber, stones, and other materials brought together for the construction of a building be regarded as a part of the farm before the building is erected, as the manure before it is applied.

Between the vendor and the vendee the rule, as to what is personal and what real estate, is the same as between the heir at law and the executor. As between the latter, it obtains with the most rigor in favor of the inheritance and against the right to consider as personal property anything which has been affixed or is appurtenant to the freehold. Yet, as between them, manure has ever been regarded as personal property, and sold by the executor without a question of the right to do so. * * *

Toller, in his law of executors, page 150, says: "Manure in a heap, before it is spread on the land, is a personal chattel."

In Carver v. Pierce, Styles 66, cited in 11 Vin. Ab. 175, Executor 2, Roll, J., as early as Mich. term of 23 Charles, held that dung in a heap is a chattel, but if spread upon the land it is not.

Such is the rule of the common law, and also of the ecclesiastical law, and as we have no statute on the subject, it is also the law of New Jersey, and I can find no satisfactory reason in any commentary or in the adjudication of other states for changing the rule.

In 2 Kent's Com. 346, it is laid down that manure lying upon the land, and fixtures erected by the vendor for the purpose of trade and manufactures, such as potash kettles, pass to the vendee of the land. But the author is there treating of fixtures, and refers for authority to cases which, so far as they relate to manure, cannot be sustained on the principles of the common law, as between vendor and vendee, or landlord and tenant, in the absence of some covenant or local custom to control them. Miller v. Plumb, 6 Cowen 665, relates strictly to the question of fixtures, the right to potash kettles, troughs, and leaches. In Kirwan v. Latour, 1 Har.

& Johns. 289, the right to a still-house apparatus and utensils for carrying on a distillery was a question.

Powell v. Monson, 3 Mason 459, relates to the millwheel and gearing of a factory, and Farrer v. Stackpole, 6 Greenl., p. 154, to the fixtures of a sawmill. Unless the discriminating commentator can be supposed to have adopted the fallacy of the reasoning in Kittredge v. Woods, 3 New Hamp. R. 503, it is fair to presume that, in speaking of manure lying upon the ground, he had reference to such as had been spread upon the land, and appropriated to it.

In Kittredge v. Woods, 3 New Hamp. R. 503, decided in 1829, Ch. Just. Richardson, in a very elaborate opinion, held that all manure, whether it be in heaps about barns or made in other places on the land, goes with the land to the vendee. As this is a leading case, which has been followed and relied upon by the courts in nearly all the cases in New England and New York, it may be proper to examine the principles on which it is based.

After discussing the law of fixtures between parties in their various relations, the Chief Justice refers to authorities to show that things which, although not affixed to the freehold, go to the heir as appurtenances to the inheritance, namely to doves able to fly, which with the dovecot go to the heir, while young doves in the dove-house not able to fly belong to the executor. He refers, also, to the keys of the doors and to chests containing the title deeds, which go to the heir, and then adds—"We are inclined to think that the principle of these decisions will give to the heir the manure which may be carried out and left upon the field in heaps for dressing, or which may be left lying in heaps about the barns upon the land."

But I am at a loss to perceive how the rules for the disposition of such articles can change or modify the equally well settled rules as to manure.

* * * These articles are all regarded as belonging to the freehold, although in fact severed from it. Having been appropriated to the land, like boards which have fallen from the fence or building, or like a mill-stone which has been lifted from its bed for the purpose of being picked, they continue to be a part of it. Hence I have ventured to characterize the reasoning and deductions of the case as fallacious.

Daniels v. Pond, 21 Pick. 367, decided in 1838, has also been considered as a leading case in relation to manure.

In the opinion of the court, expressed by Chief Justice Shaw,

it was declared that manure made on a farm occupied by a tenant at will or for years in the ordinary course of husbandry, consisting of collections from the stable and barn-yard, or of compost formed by an admixture of these with the soil or other substances, is, by usage, practice, and general understanding, so attached to and connected with the realty that, in the absence of any express stipulation on the subject, the outgoing tenant has no right to remove it, or to sell it to be removed. This opinion is expressly based on usage, practice, and general understanding, and is consequently of no value in a case where there is no proof of any such usage or practice.

In Middlebrook v. Corwin, 15 Wend. R. 170, determined in 1836, Nelson, J., cites the English authorities above referred to as fixing the rule on this subject, and adds, perhaps this rule is to be taken with some qualifications.

The practice and usage of the neighboring country, and even in relation to a particular farm, should enter into the decision of the question; because the parties are presumed to enter into the engagement with reference to it, where there is no express stipulation. And he concludes a tenant has no right to remove the manure.

While this case recognizes the rule of the common law, it seeks to modify it by the consideration of local usage; but it can have no weight against that rule in this case, where there is no evidence of any such usage.

The cases thus referred to and considered are leading cases, and have had their influence on those which followed them, and it is sufficient for the present purpose to say, that although they are entitled to great respect and to much weight where they are applicable, yet that the reasoning and the principle of none of them are such as to induce us to make innovation upon the rule of the ecclesiastical and common law long recognized and maintained by us.

The conclusion is that manure lying in and around the yard, not spread upon the land, is personal property, and does not by virtue of the deed of conveyance pass with the freehold; that there is no error in the charge of the court below, and that the judgment must be affirmed with costs.[33]

For affirmance—The Chancellor, Judges HAINES, V. REDENBURGH, WHELPLEY, COMBS, SWAIN, and WOOD.

For reversal—Judges VAN DYKE and CORNELISON.

[33] See Childs' Personal Property, § 31.

CHAPTER III.

CHOSES IN POSSESSION.

Animals.

GRAHAM v. SMITH.

100 Ga. 434, 28 S. E. 225, 62 Am. St. 323, 40 L. R. A. 503. 1897.

Trover for conversion of dog.

The facts as stated by the court are as follows:

Smith brought bail trover in a magistrate's court against Graham to recover the possession "of one terrier slut, named Belle," describing it, to which he claimed title, which he alleged was worth $10, and that Graham was in possession of it, etc. Graham demurred generally, because under the laws of Georgia a dog is not property for civil purposes, is not and could not be the subject-matter of conversion, and could not be made the subject-matter of contract, having no value in law, and because plaintiff's remedy, if any, is by possessory warrant. The magistrate overruled the demurrer, and this decision was sustained on certiorari.

Little, J.—The official report states the facts. It is somewhat difficult to determine the status of the dog as property in this state. It is not difficult to show that the owner has a property right in the animal, but it is difficult to define the nature and extent of it. This right seems to be better defined at common law than it is by the construction which this court has put upon our statutes. Our constitution (article 7, § 2, par. 1) impliedly recognizes dogs as property. It provides that the general assembly may impose a tax upon such domestic animals as, from their nature and habits, are destructive of other property. It is true that this power to tax partakes of the nature of a police regulation, and is made the exception to our uniform and ad valorem system of taxation; but

the words giving the power evidently intend to and do denote the dog as a domestic animal, and, by reference, class this animal with other property. Section 2965 of the Code recognizes the ownership of dogs, in that it makes the owners liable to suit for the recovery of damages for injuries inflicted by their dogs under certain circumstances. Section 4402 of the Code makes the dog, *eo nomine*, a subject of simple larceny. This provision, however, does not seem to bring the dog as property to any high degree, because, in speaking of all other domestic animals, it is provided, "and also a dog" may be the subject of simple larceny, implying two things—that he was not, therefore, a subject of simple larceny, nor was he a domestic animal. To one of us, at least, a possible reason why the dog may not, by common consent, have been accorded a place among domestic animals not more worthy and even less valuable, is suggested by a learned writer (Grotius) when he says, "The reason why some creatures fly and avoid us is not the want of gentleness and mildness on their part, but on ours." In Jemison v. Railroad, 75 Ga. 444, which was an action against a railroad company for the negligent and malicious killing of a dog by the operation of a train of cars, it was held that a dog is property only in a qualified sense, and that such an action would not lie; and in the case of Patton v. State, 93 Ga. 111, 19 S. E. 734, it was held that the willful and malicious killing of a dog was not an indictable offense, under section 4627 of our Code. In the latter case, however, the ruling was based on the construction that the subjects of that particular statute were inanimate property. In the case, however, of Manning v. Mitcherson, 69 Ga. 447, it was ruled that the law of this state contemplated that, to have property in animals which are wild by nature, the owner must have them within his actual possession, custody, or control, and this may be done by taming, domesticating, or confining them; and it was ruled also in that case that a possessory warrant would lie for the recovery of a bird when so in possession; and animals, by that decision, come under the same class. It is therefore apparent that an owner has property in his dog, and that this property is sufficient to support an action to recover possession of it when such has been lost.

Dogs have been held to be property by the courts in the District of Columbia, in Kansas, Texas, Connecticut, Tennessee, Michigan, Nebraska, Utah, and perhaps in other states. A contrary ruling has been made in several of the other states. His status seems to be more clearly defined by the common law. The compilers of the

American & English Encyclopedia of Law (volume 1, p. 584) lay down the proposition that "at common law the dog is considered a tame, harmless and docile animal." If this be true—and our investigation does not bear it out to its full meaning—then the owner can have an absolute property in such animals, because "animals which are of a tame and domestic nature are the subjects of absolute property." 7 Am. & Eng. Enc. Law, p. 572. The latter proposition is supported by reference to a number of authorities. We, however, think that Chancellor Kent more correctly lays down the common-law rule that "animals *ferae naturae,* so long as they are reclaimed by the art and power of man, are also the subject of a qualified property," and that "while this qualified property continues, it is as much under the protection of law as any other property, and every invasion of it is redressed in the same maner." 2 Kent. Comm. § 348. Thus, it has been held that trover lies for wild geese which have been tamed, but which, without regaining their natural liberty, have strayed away. Amory v. Flyn, 10 Johns. 102. So, also, for domestic fowls. Leonard v. Belknap, 47 Vt. 603. Blackstone declares that the property in a dog is base property, but that such property is sufficient to maintain a civil action for its loss. 4 Bl. Comm. 236. Professor Schouler, in his treatise on the Law of Personal Property (section 49), pronounces the dog to be a tame animal, from which definition it would appear that an owner can acquire an absolute property in the animal; and he distinguishes this animal from such others as property can be acquired in only by possession. So, it will be seen that at the common law and under our statutes the owner has property in his dog, and not only so, but such property right is sufficient to maintain a civil action to recover its possession.

In the case now under consideration the defendant in error brought an action of trover in a justice's court to recover possession of his dog. A demurrer was filed to the proceeding in that court, which was overruled by the magistrate, and the case taken to the superior court by writ of certiorari; whereupon the judge of the latter court held that the ruling of the magistrate was correct. So do we, on the authorities before referred to. The action of trover, while changed with us in some respects, was originally a special action on the case, in favor of any person who had a general or special property in goods against any person who wrongfully withheld them from his possession. The special or qualified property which has been shown to exist in animals of this character is sufficient to support this action. The action lies for

every species of personal property, animate or inanimate. 6 Wait, Act. & Def. pp. 128, 155. The question was expressly ruled in the state of Massachusetts, even though the courts of that state had declared that the property right in a dog was only a qualified one. See Cummings v. Perham, 1 Metc. (Mass.) 555. The question was likewise ruled in Binstead v. Buck, 2 W. Bl. top page 1117. The judgment of the court below is affirmed.[1]

REED v. GOLDNECK.

112 Mo. App. 310, 86 S. W. 1104. 1905.

Action for damages for killing dog.

* * * The circuit court, upon hearing the evidence, found the issues for the defendant. Plaintiff appealed to this court.

The evidence tended to show that plaintiff and others were out fox hunting, started a fox about 10:30 o'clock, and shortly after midnight, while the dogs were trailing on defendant's premises near his house and barn, and while inside an inclosure in which he had 175 or 180 goats and some 25 rabbits, defendant arose from his bed, went into the yard, and shot the dog. Defendant's evidence showed that a short time before that he had had 15 goats killed by dogs. Defendant's neighbor testified that he lived about 200 yards from the defendant; that he, too, had recently had some sheep killed by dogs. At the time the dog was shot he was moving away from where the goats were kept, and was in the inclosure where defendant kept the rabbits, and stopped at the goat pen long enough to be shot. Defendant testified: "Q. Then this dog wasn't doing one identical thing to your property when you shot him? A. It was too dark to see what he was doing. Q. You simply shot him because he was on your premises? A. No, I didn't. Q. Why did you shoot him? A. Because I thought he was killing my goats and rabbits. Q. What made you think he was killing them? A. Because he was right in a sheep-killing dog's place." Appellant's counsel argues that the finding of the court below should have been for appellant; that dogs in this state are property, and no one has a right to kill them except for just cause, and says:

[1] See Childs' Personal Property, § 34.

"They may be killed, however, to protect one's property, but not simply because they are found on such other's land."

NORTONI, J.—It has long been the settled law that dogs are property in Missouri, and that no one has a right to kill them except for just cause. It has always been the rule, however, that they might be killed for just cause. It has been held that one has no right to kill a dog because it is found on his land, when threatening no immediate danger to his property. Fenton v. Bisel, 80 Mo. App. 135; Gillum v. Sisson, 53 Mo. App. 516; Woolsey v. Haas, 65 Mo. App. 198; Brauer v. English, 21 Mo. App. 490; Carpenter v. Lippitt, 77 Mo. 242. Section 1898 of the Revised Statutes of 1899, defining grand larceny, provides a dog shall be considered as personal property for the purposes of that section. The common law gives a man the right to use such force as is necessary, and no more, to protect his own property, and under this ancient rule, which obtains in this state, there would be no question of the right of a person owning sheep or goats or rabbits or other domestic animals liable to injury and death from dogs, to use such force as is necessary, and no more, in the protection of his property, where danger is imminent, the degree of force to be measured by the imminence of the peril. Gillum v. Sisson, 53 Mo. App. 520; Brauer v. English, 21 Mo. App. 490. In 1899 the Legislature furnished us a new section on the subject of dogs in this state. It is as follows: "If any person shall discover any dog or dogs in the act of killing, wounding or chasing sheep in any portion of this State, or shall discover any dog or dogs under such circumstances as to satisfactorily show that such dog or dogs has or have been recently engaged in killing or chasing sheep or other domestic animal or animals, such person is authorized to immediately pursue and kill such dog or dogs; provided, however, that such dog or dogs shall not be killed in any enclosure belonging to or being in lawful possession of the owner of such dog or dogs." Section 6976, Rev. St. 1899. This section has come into our law since any of the above cases on this subject have been decided. The statute went into effect a few months only after the decision of the case of Fenton v. Bisel, 80 Mo. App. 135, by the Kansas City Court of Appeals, and therefore was not noticed in the opinion in that case. Under the rule of the common law which obtained prior to the statute as announced in the cases supra, one was not justified in killing a dog, even though it was on his premises, unless the dog was actually doing injury or attempting to do injury to his domestic animals; and

in the latter case the danger from the dog must have been so apparent as to threaten imminent peril. Gillum v. Sisson, 53 Mo. App. 516; Fenton v. Bisel, 80 Mo. App. 135; Woolsey v. Haas, 65 Mo. App. 198. This being the settled law at the time the statute was enacted, we must presume that the Legislature knew the law as it existed, and sought to make some change therein by statutory innovation. * * * It appears that the first clause of the section is declaratory of the common law on the subject. The second clause is a new act of outlawry against the dog, and one who kills a dog and undertakes to justify his act under it must show to the reasonable satisfaction of the jury, by the facts and circumstances surrounding the killing, that the dog had recently been engaged in killing or chasing sheep or other domestic animals; and hence one who kills a dog under the suspicious circumstances mentioned in the second clause does so at the risk of paying the owner the value of the dog, or of satisfying the court or jury, as the case may be, the triers of the facts, that he was outlawed under the second clause of the statute; and if the dog be found either killing or chasing the animals, or under such circumstances as would make it appear satisfactorily to the jury that the dog had been engaged either in killing or chasing the animals, then the killing of the dog is justifiable. Then, too, this statute authorizes any person to kill the dog under the circumstances mentioned. It is immaterial whether he be the person owning the animals or not. The evidence shows that the respondent and his neighbor as well had recently lost animals by the ravages of dogs. This dog was discovered by him in the very midst of his goats and rabbits, in the night, under very suspicious circumstances indeed. It seems to us that there is substantial evidence to support the judgment of the trial court to the effect that the dog was either then, or had recently been, engaged in chasing the animals; and this is sufficient in law, if it was sufficient to satisfy the court who tried the facts. * * *

Our conclusion is there was substantial testimony to support the finding of the trial court, and the judgment ought to be affirmed. It is so ordered. All concur.[2]

[2] See Childs' Personal Property, § 34.

FISH. 12

STATE v. SHAW et al.

67 Ohio St. 157, 65 N. E. 875, 60 L. R. A. 481. 1902.

Indictment for larceny of fish.

[Shaw and others were indicted for larceny in taking a quantity of fish from trap nets set in the lake near Cleveland, and owned by Maurice E. Grow and John Hough. From a verdict of not guilty the state excepted.]

DAVIS, J.—Fish are *ferae naturae;* yet, "where the animals or other creatures are not domestic, but are *ferae naturae,* larceny may notwithstanding be committed of them, if they are fit for food of man, and dead, reclaimed (and known to be so), or confined. Thus * * * fish in a tank or net, or, as it seems, in any other inclosed place which is private property, and where they may be taken at any time at the pleasure of the owner, * * * the taking of them with felonious intent will be larceny." 2 Russ. Cr. 83. "Fish confined in a tank or net are sufficiently secured." 2 Bish. Cr. Law, § 775.

The trial judge seems to have directed the jury to return a verdict of "not guilty" on the theory that the fish must have been confined so that there was absolutely no possibility of escape. We think that this doctrine is both unnecessarily technical and erroneous. For example, bees in a hive may be the subject of larceny, yet it is possible for the bees to leave the hive by the same place at which they entered. To acquire a property right in animals *ferae naturae,* the pursuer must bring them into his power and control, and so maintain his control as to show that he does not intend to abandon them again to the world at large. When he has confined them within his own private inclosure, where he may subject them to his own use at his pleasure, and maintains reasonable precautions to prevent escape, they are so impressed with his proprietorship that a felonious taking of them from his inclosure, whether trap, cage, park, net, or whatever it may be, will be larceny. For such cases, as is clearly shown by the authorities above quoted, the law does not require absolute security against the possibility of escape, and none of the authorities cited for the defendants in error, except Norton v. Ladd, 5 N. H. 203, 20 Am.

Dec. 573, sustain their contention. Young v. Hichens, 6 Q. B. 606, is not applicable to this case. That was an action for the conversion of fish which were never in the plaintiff's net, but had been frightened away from entering into the plaintiff's net by the defendant, and caught in his own net.

In the present case the fish were not at large in Lake Erie. They were confined in nets, from which it was not absolutely impossible for them to escape, yet it was practically so impossible; for it seems that under ordinary circumstances few, if any, of the fish escape. The fish that were taken had not escaped, and it does not appear that they would have escaped, or even that they probably would have escaped. They were so safely secured that the owners of the nets could have taken them out of the water at will as readily as the defendants did. The possession of the owners of the nets was so complete and certain that the defendants went to the nets and raised them with absolute assurance that they could get the fish that were in them. We think, therefore, that the owners of the nets, having captured and confined the fish, had acquired such a property in them that the taking of them was larceny.

Exceptions sustained.

BURKET, C. J., and SPEAR, SHAUCK, PRICE, and CREW, JJ., concur.[3]

BEES.

GOFF v. KILTS.

15 Wend. (N. Y.) 550, 1836.

[Trespass for taking and destroying a swarm of bees and the honey made by them. Kilts, who owned the bees, saw them leave the hive, fly off and alight in a tree on lands owned by the Lenox Iron Company. He followed them and marked the tree. Two months afterward, Goff cut down the tree, destroyed the bees, and took the honey, whereupon Kilts sued him and recovered judgment. Defendant appealed.]

[3] Clams or oysters, when transplanted to a bed where none grew naturally, may be subject to larceny. People v. Morrison et al., 194 N. Y. 175, 96 N. E. 1120, 128 Am. St. 552.

See Childs' Personal Property, §§ 34-112.

By the court, NELSON, J.—Animals *ferae naturae,* when reclaimed by the act and power of man, are the subject of a qualified property; if they return to their natural liberty and wildness, without the *animus revertendi,* it ceases. During the existence of the qualified property, it is under the protection of the law the same as any other property, and every invasion of it is redressed in the same manner. *Bees* are *ferae naturae,* but when hived and reclaimed, a person may have a qualified property in them by the law of nature, as well as the civil law. Occupation, that is, hiving or enclosing them, gives property in them. They are now a common species of property, and an article of trade, and the wildness of their nature by experience and practice has become essentially subjected to the art and power of man. An unreclaimed swarm, like all other wild animals, belongs to the first occupant—in other words, to the person who first hives them; but if a swarm fly from the hive of another, his qualified property continues so long as he can keep them in sight, and possesses the power to pursue them. Under these circumstances, no one else is entitled to take them. 2 Black. Comm. 393. 2 Kent's Comm. 394.

The question here is not between the owner of the soil upon which the tree stood that included the swarm and the owner of the bees: as to him, the owner of the bees would not be able to regain his property, or the fruits of it without being guilty of trespass. But it by no means follows, from this predicament, that the right to the enjoyment of the property is lost; that the bees therefore become again *ferae naturae,* and belong to the first occupant. If a domestic or tame animal of one person should stray to the enclosure of another, the owner could not follow and retake it, without being liable for a trespass. The absolute right of property, notwithstanding, would still continue in him. Of this there can be no doubt. So in respect to the qualified property in the bees. If it continued in the owner after they hived themselves, and abode in the hollow tree, as this qualified interest is under the same protection of law as if absolute, the like remedy existed in case of an invasion of it. It cannot, I think, be doubted, that if the property in the swarm continues while within sight of the owner—in other words, while he can distinguish and identify it in the air—that it equally belongs to him if it settles upon a branch or in the trunk of a tree, and remains there under his observation and charge. If a stranger has no right to take the swarm in the former case, and of which there seems no question,

he ought not to be permitted to take it in the latter, when it is more confined and within the control of the occupant.

It is said the *owner of the soil* is entitled to the tree and all within it. This may be true, so far as respects an unreclaimed swarm. While it remains there in that condition, it may, like birds or other game, (game laws out of the question), belong to the owner or occupant of the forest, *ratione soli.* According to the law of nature, where prior occupancy alone gave right, the individual who first hived the swarm would be entitled to the property in it; but since the institution of civil society, and the regulation of the right of property by its positive laws, the forest as well as the cultivated field, belong exclusively to the owner, who has acquired a title to it under those laws. The natural right to the enjoyment of the sport of hunting and fowling, wherever animals *ferae naturae* could be found, has given way, in the progress of society, to the establishment of rights of property better defined and of a more durable character. Hence no one has a right to invade the enclosure of another for this purpose. He would be a trespasser, and as such liable for the game taken. An exception may exist in the case of noxious animals, destructive in their nature. Mr. Justice BLACKSTONE says, if a man starts game in another's private grounds, and kills it there, the property belongs to him in whose ground it is killed, because it was started there, the property arising *ratione soli.* 2 Black Com. 419. But if animals *ferae naturae* that have been *reclaimed,* and a qualified property obtained in them, escape into the private grounds of another in a way that does not restore them to their natural condition, a different rule obviously applies. They are then not exposed to become the property of the first occupant. The right of the owner continues, and though he cannot pursue and take them without being liable for a trespass, still this difficulty should not operate as an abandonment of the animals to their former liberty. The rights of both parties should be regarded, and reconciled as far as is consistent with a reasonable protection of each. The cases of Heermance v. Vernay, 6 Johns. R. 5, and Blake v. Jerome, 14 id. 406, are authorities for saying, if any were wanted, that the inability of the owner of a personal chattel to retake it while on the premises of another, without committing a trespass, does not impair his legal interest in the property. It only embarrasses the use or enjoyment of it. The owner of the soil, therefore, acquiring no right to the property in the bees, the defendant below cannot protect himself by showing it out of the plaintiff in that

way. It still continues in him, and draws after it the possession sufficient to maintain this action against a third person, who invades it by virtue of no other claim than that derived from the law of nature. This case is distinguishable from the cases of Gillet v. Mason, 7 Johns. R. 16, and Ferguson v. Miller, 1 Cowen, 243. The first presented a question between the finder and a person interested in the soil; the other between two persons, each claiming as the first finder. The plaintiff in the last case, though the first finder, had not acquired a qualified property in the swarm according to the law of prior occupancy. The defendant had. Besides, the swarm being unreclaimed from their natural liberty while in the tree, belonged to the owner of the soil *ratione soli*. For these reasons I am of opinion that the judgment of the court below should be affirmed.

Judgment affirmed.[4]

MONEY.

KLAUBER et al. v. BIGGERSTAFF et al.

47 Wis. 551, 3 N. W. 625, 32 Am. Rep. 773. 1879.

The facts are stated in the opinion.

RYAN, C. J.—The controlling question in this case is whether the certificate of deposit stated in the proceedings is negotiable.

"A promissory note may be defined to be a written engagement by one person to pay another person therein named, absolutely and unconditionally, a certain sum of money at a time specified therein." Story on Prom. Notes, § 1. The ordinary form of a certificate of deposit of money falls precisely within the definition, and it seems strange that there ever was a doubt that it was in law a negotiable promissory note. O'Neill v. Bradford, 1 Pin. 390, and cases there cited. Such doubt, however, may now be considered at rest. Kilgore v. Bulkley, 14 Conn. 362; Bank v. Merrill, 2 Hill, 295; Miller v. Austen, 13 How. 218.

The learned counsel for the respondents concedes this; but he takes the position that the certificate of deposit in question is not

[4] See Childs' Personal Property, §§ 34, 112. Wild Animals. See Geer v. State of Connecticut, p. 260.

a promissory note, because it is not payable in money. It is for so many dollars, payable in currency; and the learned counsel contends that the word *currency* does not express or imply money * * *

Money is a generic and comprehensive term. It is not a synonym of coin. It includes coin, but is not confined to it. It includes whatever is lawfully and actually current in buying and selling of the value and as the equivalent of coin. By universal consent, under the sanction of all courts everywhere, or almost everywhere, bank-notes lawfully issued, actually current at par in lieu of coin, are money. The common term, paper money, is in a legal sense quite as accurate as the term coined money.

The question whether bank notes are money or only *choses in action,* was directly involved in Miller v. Race, 1 Burr. 452.

"The whole fallacy of the argument," says Lord Mansfield, in delivering the unanimous opinion of the court, "turns upon comparing bank-notes to what they do not resemble and what they ought not to be compared to, viz: to goods, or to securities, or documents for debts.

"Now they are not goods, not securities, nor documents for debts, nor are so esteemed; but are treated as *money,* as *cash,* in the ordinary course and transaction of business, by the general consent of mankind, which gives them the credit and *currency* of money to all intents and purposes. They are as much money as guineas themselves are, or any *current* coin that is used in common payments as money or cash.

"They pass by a will, which bequeaths all the testator's money or cash, and are never considered as securities for money, but as money itself. Upon Lord Ailesbury's will £900 in bank-notes was considered as cash. On payment of them, wherever a receipt is required, the receipts are always given as for money, not as for securities or notes.

"So in bankruptcies, they cannot be followed as identical and distinguishable from money, but are always considered as money or cash.

"It is pity that reporters sometimes catch at quaint expressions that may happen to be dropped at the bar or bench, and mistake their meaning. It has been quaintly said 'that the reason why money cannot be followed is because it has no ear-mark;' but this is not true. The true reason is, upon account of the *currency* of it it cannot be recovered after it has passed in *currency.* So, in case of money stolen, the true owner cannot recover it after

it has been paid away fairly and honestly upon a valuable and *bona fide* consideration; but before money has passed in *currency* an action may be brought for the money itself. * * *

"Apply this to the case of a bank-note: an action may lie against the finder, it is true, (and it is not at all denied), but not after it had been paid away in *currency*. And this point has been determined, even in the infancy of bank-notes, for 1 Salk. 126, M. 10, W. 3, at *nisi prius*, is in point. * * *

It has also been very generally followed in this country. In Bank of U. S. v. Bank of Georgia, 10 Wheat. 333, Mr. Justice STORY, in delivering the opinion of the court, says: "Bank-notes constitute a part of the common *currency* of the country, and, ordinarily, pass as money. When they are received as payment the receipt is always given for them as money. They are a good tender as money, unless specially objected to; and, as Lord Mansfield observed, in Miller v. Race, 1 Burr. Rep. 457, they are not, like bills of exchange, considered as mere securities or documents for debts."

Here is a distinction, recognized in many of the cases, between currency which is money and currency which is legal tender. To be money, part of the circulating medium, it is not essential that currency should be legal tender against the wishes of the person to whom it is tendered. Even coined money is not, under all circumstances, legal tender. Sears v. Dewing, 14 Allen, 413; Mather v. Kinnick, 51 Pa. St. 425.

But paper currency—bank-notes—which are current *de jure et de facto*, are legal tender unless specially objected to at the time of tender, for the reason that they are money, though not absolutely legal tender. With some exceptions this doctrine is general in this country. * * *

In fact almost all civilized countries, including this country, have a mixed circulation of coin and bank-notes. These constitute the currency of the country—its money; and the general term, currency, includes both. Currency, therefore, means money—coined money and paper money equally. But it means money only; and the only practical distinction between paper money and coined money, as currency, is that coined money must generally be received, paper money may generally be specially refused, in payment of debt; but a payment in either is equally made in money—equally good. The confusion in the cases appears to have arisen for want of proper distinction between money which is current and money which is legal tender. The property of being legal

tender is not necessarily inherent in money; it generally belongs no more to inferior coin than to paper money.

In the use of the term, currency does not necessarily include all bank-notes in actual circulation; for all bank-notes are not necessarily money. In this use of the term, currency includes only such bank-notes as are current *de jure et de facto* at the *locus in quo;* that is, bank-notes which are issued for circulation by authority of law, and are in actual and general circulation at par with coin, as a substitute for coin, interchangeable with coin; bank-notes which actually represent dollars and cents, and are paid and received for dollars and cents at their legal standard value. Whatever is at a discount—that is, whatever represents less than the standard value of coined dollars and cents at par—does not properly represent dollars and cents, and is not money; is not properly included in the word currency. In this sense national bank-notes, which are not legal tender, are now as much currency as treasury notes, which are legal tender.

This construction of the term currency might, perhaps, properly be extended to the term current funds. It must extend to the latter term whenever it is used in the legal sense of money. Bankers and money-dealers cannot, by choice or use of terms, give the character and attributes of money to anything not money—to anything of less value than money.

The legislature has doubtless power to make negotiable paper other than for the payment of money, (Price v. Bank, 43 Wis. 267); but where a statute is plainly intended to apply to money, every term used to indicate money, not commodities, must be held to signify money in the sense in which that term is here used.

The certificate of deposit in this case calls for so many dollars; that is to say, for so much money. It makes them payable in currency, which also means money. It could be paid only in money. It was, therefore, clearly negotiable under the statute of Anne. Whether the holder could claim its payment in legal tender is a different question, not in this case, and not passed upon.

The negotiability of certificates of deposit is of vast importance in commerce. Their want of negotiability upon slight grounds would go largely to prevent their usefulness in the course of business; and this court considers it far wiser to hold them payable in money, when the terms used will admit of that construction, than to hold them not to be negotiable on the ground of the particular terms used.

The judgment is reversed, and the cause remanded to the court below, with directions to render judgment for the garnishee, the appellant here.[5]

15

TENDER.

Must be Unconditional.

POTTS v. PLAISTED.

30 Mich. 149. 1874.

The facts are stated in the opinion.

CHRISTIANCY, J.—In each of these cases the bill is to foreclose a mortgage, and the only defense relied upon, against a decree of foreclosure and sale, was a tender of the amount due upon the respective mortgages before the filing of the bill, and the consequent discharge of the lien of the mortgage.

The only question, therefore, is one of fact, to be decided upon the evidence in the record, whether a tender was made of the amount due upon the respective mortgages, in such manner that complainant, the holder of the mortgages, understood it at the time as a present, absolute and unconditional tender of the amount, and that it was intended to be then and there paid down in extinguishment of the mortgages. If such a tender was clearly proved, the lien of the mortgages was thereby, *ipso facto*, discharged, and complainant could only look to the personal responsibility of the parties liable for the mortgage debt; and this, though the tender was not kept good, so that complainant might have taken the money had he subsequently concluded to do so. Moynahan v. Moore, 9 Mich. 9; Carathers v. Humphrey, 12 Mich., 270; Van Husan v. Kanouse, 13 Mich. 303.

In view of the serious consequences to the holder of a mortgage, upon the refusal of a tender—consequences which may often amount to the absolute loss of the entire debt—and in view of the strong temptation which must exist to contrive merely colorable or sham tenders, not intended in good faith, we think the evidence should be so full, clear and satisfactory, as to leave no reasonable

[5] See Childs' Personal Property, § 48.

doubt that the tender was so made that the holder must have understood it at the time to be a present, absolute and unconditional tender, intended to be in full payment and extinguishment of the mortgage, and not dependent upon his first executing a receipt or discharge, or any other contingency. And the holder must, in every case, have a reasonable opportunity to look over the mortgage and accompanying papers, to calculate and ascertain the amount due; and if such papers are not present, he must be allowed a reasonable time to get them and make the calculation. He cannot be bound, under the penalty or at the hazard of losing his entire debt, to carry at all times, in his head, the precise amount due, on any particular day.

In view of these principles, we have carefully examined the evidence in these cases, and we are not satisfied, whatever may have been the intention of the parties attempting to make the tender, that the complainant was made fairly and clearly to understand the transaction as a then present, absolute and unconditional tender of the amount due upon the respective mortgages, not dependent upon his first executing a receipt or discharge. The mortgages were not present, nor in complainant's hands, but had been left by him, and then were, in the hands of Mr. Harris, at Port Huron, some miles away. And though it does not clearly appear that complainant made any objection to the amount, it does appear that he had no opportunity at that particular time to examine the papers, and his objection, or at least one of his objections, to receiving the money then, was that he had not the mortgages there, but that they were in Harris' hands, in Port Huron. We think, also, there is much reason for believing that complainant understood the final conclusion of the defendants, seeking to make the tender, to be, that they would leave the money on deposit for him in Port Huron, which they failed to do, and that he could come up and get it, and discharge the mortgages.

We are not, therefore, satisfied that the defense of tender is fairly established by the evidence. The decree of the court below for foreclosure and sale must, therefore, be affirmed, with costs.

The other justices concurred.[6]

[6] See Childs' Personal Property, § 50.

Proper Sum.

MOORE v. NORMAN.

52 Minn. 83, 53 N. W. 809, 18 L. R. A. 359. 1892.

The facts are stated in the opinion.

Dickinson, J.—The defendant, to secure two promissory notes executed by him to the plaintiff, mortgaged certain personal property to her. She prosecutes this action to recover possession of a part of the mortgaged property by virtue of her rights as such mortgagee. A former appeal in this action is reported in 43 Minn. 428, 45 N. W. Rep. 857. The only issue to which reference is now necessary is as to whether certain payments and a tender of payment made by the defendant were sufficient and effectual to discharge the mortgages. The whole transaction on the part of the plaintiff was conducted by one George R. Moore, who was her general agent. Long after the maturity of the notes the defendant made a tender of payment to the plaintiff, which on his part is claimed to have been sufficient in amount, with payments which had been previously made, to complete the payment of the debt, and hence to discharge the mortgages. Moore v. Norman, 43 Minn. 428, 45 N. W. Rep. 857. The plaintiff, however, then claimed that the amount tendered was not sufficient to pay the debt; and whether it was so or not was one of the issues in this case, in respect to which the plaintiff's contention, that the amount was insufficient, was supported by evidence which would have sustained a verdict in her favor. The evidence tended to show that the tender was accompanied by a demand that the notes be surrendered; that such surrender was refused, a larger sum being claimed to be due; but that the plaintiff (by her agent, who held the notes) offered to receive the money tendered, and indorse it on the notes, which offer the defendant refused to accept. The court, at the request of the defendant, charged the jury to the effect that if the amount tendered was sufficient the defendant had a right to demand the surrender of his notes. This constitutes one of the errors assigned. We think, as applied to the circumstances of this case, this instruction was erroneous. It may be stated as a general proposition, applicable at least where it appears that a larger sum than that tendered is in good faith claimed to be due, that the tender is not effectual as such if it be coupled with such conditions that the

acceptance of it, as tendered, will involve an admission by the party accepting it that no more is due. * * * Thayer v. Brackett, 12 Mass. 450; Wood v. Hitchcock, 20 Wend. 47; Noyes v. Wyckoff, 114 N. Y. 204, 21 N. E. Rep. 158; Holton v. Brown, 18 Vt. 224. See, further, in support of the general rule that a tender, to be effectual must be absolute and unconditional. Moore v. Norman, 43 Minn. 428, 434, 45 N. W. Rep. 857; Bank v. Hove, 45 Minn. 40, 42, 47 N. W. Rep. 449; Balme v. Wambaugh, 16 Minn. 116, (Gil. 106). The most common and familiar illustrations of the proposition above stated are cases where the tender is made as being all that is due, or as payment in full. It is everywhere held that such a tender is not good. The debtor has no right to the benefit of a tender, as having the effect of a payment, when it is burdened with such a condition that the creditor cannot accept the money without compromising his legal right to recover the further sum which he claims to be due. This case falls within the same principle. By offering to pay the money only upon the condition that the plaintiff deliver up the notes (if such was the fact), the defendant insisted upon a condition the acceptance of which would at least seriously compromise the right of the plaintiff to recover any more, even though it should be true that the amount unpaid exceeded the sum tendered. The acceptance of the money and the surrender of the notes would be at least strong evidence against her, in the nature of an admission, that the notes were thereby fully paid. The defendant should not be heard to assert that a mere offer to pay a specified sum, less than was supposed by the other party to be due, has the effect of a payment, so as to discharge the mortgage, when the offer was burdened with such a condition. It was enough for his protection that the plaintiff would have received the money offered and have indorsed its payment on the notes, which were already overdue and still in the hands of the plaintiff. If the defendant rejected this offer, and insisted upon the surrender of the notes, the natural and only reasonable construction to be put upon his conduct was that he insisted that the tender, if accepted, should be accepted as payment of the notes in full. If that was the effect of the tender, it was bad, under all the authorities. A mere tender should not be effectual to discharge the lien of a mortgage unless it be certainly sufficient in amount, and unburdened with any conditions which the debtor has not a clear right to impose. See Moore v. Norman

and Bank v. Hove, *supra*. A new trial must be granted for the reason above stated. * * *

Order reversed.[7]

CHECK.

2

GUNBY v. INGRAM et ux.

57 Wash. 97, 106 Pac. 495, 36 L. R. A. (N. S.) 232. 1910.

The facts are stated in the opinion.

DUNBAR, J.—This is an appeal from a real estate foreclosure judgment. On the 5th day of June, 1907, the appellants executed two promissory notes to Lusetta Newell in the sum of $5,000, which notes were secured by a real estate mortgage on certain property belonging to appellants. One note was duly paid, and the other note of $2,500 remained unpaid. This note provided for maturity of the whole debt in case of nonpayment of contract when due. There was an installment of interest due on the unpaid note on the 5th day of March, 1908. It is claimed by appellants that by agreement with Lusetta Newell they were given until April 1st to pay the interest due March 5th, viz., $50. It is the contention of the respondent that there was no agreement to this effect, but that Lusetta Newell simply allowed the interest to remain unpaid without taking any action in the matter. But we are satisfied from an examination of the record that there was an agreement to that effect. However, inasmuch as the appellants did not pay the interest according to the agreement, it seems to be unnecessary to discuss that proposition. On the evening of the 2d day of April appellant L. P. Ingram mailed to Lusetta Newell a check for $50, installment of interest, which it is admitted was received by her on the morning of the 3d day of April. On the 2d day of April

[7] Tender must be made at fit time and place. Waldron v. Murphy, 40 Mich. 668.

Money must be actually produced and proffered, unless the creditor expressly or impliedly waives its production. Pinney v. Jorgenson, 27 Minn. 26, 6 N. W. 376.

Contract to pay in gold and silver coins is enforceable. (Legal Tender Cases — Bronson v. Rhodes, 74 U. S. 229, 19 L. Ed. 141.); McGoon et al. v. Shirk, 54 Ill. 408, 5 Am. Rep. 122.

See Childs' Personal Property, § 50

Lusetta Newell sold and assigned the note in question to respondent J. C. Gunby, who prepared his complaint in foreclosure and filed the same on the next day, the 3d of April. Lusetta Newell did not apply the check to the payment of the interest due, and in a few days it was sent back to the appellant L. P. Ingram. The appellants were not notified of the assignment of the note to the respondent, excepting constructively by the recording of the assignment and through the service of the complaint. These matters which we have recited were set up in the answer, together with an allegation of tender to the clerk of the court of the $50 due. In July, after the motions and preliminary pleas were made, a supplemental complaint was filed, in which it was alleged that the sum of $2,500 gold coin or principal sum mentioned in the promissory note spoken of before, together with interest thereon, had become due and payable, and still remained unpaid, and relief was asked accordingly.

* * * So far as this case is concerned, it is narrowed down to the proposition of whether a legal tender was made prior to the commencement of the action. While it is true that the assignment of this note was made to the respondent before the reception of the check by Lusetta Newell, the appellants had no notice of the assignment, and the sending of the check to Lusetta Newell would be a sufficient tender, so far as the parties are concerned, if it were otherwise good; for the relation of the debtor to the purchaser of the claim, when without notice to the debtor, is legally the same as to the original creditor.

Then, the pertinent question is: Was there a legal tender made to Lusetta Newell by the sending of the check and the receiving of the same by her before the commencement of the action, which it is conceded was the only notice of option given? There was some attempt to show notice by showing that notice had been given to the brother of appellant L. P. Ingram, but we think it was properly excluded by the court; and, so far as the record is concerned, it must be conceded that no other notice was given. It may be conceded, we think, under universal authority that a strictly good tender cannot be made by the offer of a check for the amount due. But it is well established that the creditor may waive the character of the money which is tendered by raising no objection to the payment, for the reason that it is not the character of money or specie that is called for in the obligation, or by raising some other objection which would exclude the idea of objecting on that ground. Considering the fact, which is a matter

of common knowledge, that probably 90 per cent of the business of the mercantile world is now done through the medium of checks, drafts, etc., instead of by the transfer of gold and silver coin or even of any other species of legal tender, it would be a dangerous rule to announce, and one which could easily be turned into an engine of oppression if the tender of a payment, especially where it involved the maturing of obligations which were not then due, could not be made by check, where no question was raised as to the value of the check tendered, and especially, as in this case, where it was shown that the former payments involved in this transaction had been made by checks which were not objected to by the creditor. This state of facts was testified to by the appellant L. P. Ingram: That the payment of the $2,500 which had theretofore been made and all the payments of the interest had been made in that manner. * * * Lusetta Newell herself did not testify on that subject, and the only testimony is that of the appellant Ingram which bears the impress of truth; and we think it is reasonably established that the payments had theretofore been made through the medium of checks. If that is true, it would be an injustice to the appellants to refuse to apply the payment to the interest due, and mature a large amount of money which was not then otherwise due, without any notification to the appellants of the reason for the refusal. * * *

The judgment will therefore be reversed and the cause dismissed.

RUDKIN, C. J., and PARKER, MOUNT, and CROW, JJ., concur.[8]

3

MUTILATED COIN.

CINCINNATI NORTHERN TRACTION CO. v. ROSNAGLE.

84 Ohio St. 311, 95 N. E. 884, 35 L. R. A. (N. S.) 1030. 1911.

The facts as stated by the court are as follows:

This was a proceeding brought in the common pleas court of Warren county, by Howard F. Rosnagle, an infant, by his next friend, against the Cincinnati Northern Traction Company. On May 21, 1907, the infant resided at Franklin, in Warren county, and was about 10 years old. On that day he went to the city of

[8] See Childs' Personal Property, § 50.

Middletown, in Butler county, on an errand, and in the evening boarded one of the defendant's cars at Middletown to go back to his home. When the car was near the outskirts of the city, the conductor asked him for his fare, and he tendered him a nickel. The conductor refused to accept the nickel and requested him to leave the car, which he did. The petition sets forth these facts, together with the further allegation that the night was dark, and that he became greatly frightened and went to the home of a nearby resident, who gave him care and assistance, and it alleges that he was damaged in the sum of $1,000.

The answer of the defendant admits the tender of the nickel and all the other facts, except as to damages, and further answering says that said Howard F. Rosnagle got upon the car of said defendant at or near Third street, in the city of Middletown, Ohio, and he rode upon said car to the east corporation line of said city; that when the conductor of said car demanded of him his fare he tendered to said conductor the coin commonly termed a nickel; that said coin had been mutilated, defaced, and was cracked; that the conductor of said car informed said Howard F. Rosnagle that he could not take said nickel owing to the condition that the same was in, and said Rosnagle informed the conductor that said nickel was all the money he had, and thereupon said conductor informed said Rosnagle that he would have to pay his fare or get off the car; that said Rosnagle thereupon voluntarily left the car at said point.

Plaintiff filed a reply, in which he denies that he voluntarily left said car of the defendant. On the trial a verdict was returned in favor of the plaintiff, upon which judgment was entered. This judgment was affirmed by the circuit court, and error is now prosecuted here to reverse the judgments below.

The nickel that was tendered by plaintiff to the conductor is in evidence, and it is conceded that five cents was the regular and legal fare between the points named. The error alleged and relied on by the plaintiff in error is that the court of common pleas charged, as a matter of law, that the particular nickel tendered and introduced in evidence was legal money of the United States, and a legal tender for five cents. It is claimed that there are other errors in the charge which will be noticed in the opinion.

JOHNSON, J.—There is no claim that the five-cent piece which was tendered by plaintiff was not originally a genuine coin issued by the United States. The testimony and an inspection of the coin

disclose such genuine character. It has the appearance of being somewhat bruised, and there is a slight crack from the rim toward the center. The minor coins of the United States are provided for by section 3515, Revised Statutes of the United States (U. S. Comp. St. 1901, p. 2349), in which the alloy and weight are prescribed. Section 3587, Revised Statutes of the United States (U. S. Comp. St. 1901, p. 2401), provides that the minor coins shall be legal tender, at their nominal value, for any amount, not exceeding 25 cents, in any one payment.

[1] It is not doubted that a railway company may expel from its cars persons who refuse to pay the legal fare. Necessarily that inherent power is vested in the conductor employed by the company and placed by it in charge of the train or car. But, if the company wrongfully expels one who is entitled to the rights of a passenger, it is liable in damages to such person, and this is so, even if such expulsion is done through an error of judgment on the part of the conductor or agent in charge.

[2] And where a passenger tenders to the conductor a genuine coin of the United States, not so worn, defaced, or mutilated but that its mint marks are plainly discernible, and not appreciably diminished in weight, and such tender is refused and the passenger ejected on refusal to pay in other money, he may have an action of damages against the company. And this is so, even if the conductor in good faith believed the coin to be counterfeit or not a sufficient coin. In such case the passenger is not required to tender other money, if the first coin tendered was sufficient. Chicago Union Traction Co. v. McClevey, 126 Ill. App. 21; Jersey City & Bergen R. Co. v. Morgan, 52 N. J. Law 60, 18 Atl. 904; Mobile St. Ry. Co. v. Watters, 135 Ala. 227, 33 South. 42; Atlanta Con. St. Ry. Co. v. Keeny, 99 Ga. 266, 25 S. E. 629, 33 L. R. A. 824.

In Jersey City & Bergen R. Co. v. Morgan, 52 N. J. Law, 60, 18 Atl. 904, the court in the opinion say: "It seems by these statutes (U. S. Statutes) that so long as a genuine silver coin is worn only by natural abrasion, is not appreciably diminished in weight, and retains the appearance of a coin duly issued from the mint, it is a legal tender for its original value. The coin in question in this case was shown to the court and jury, but does not appear in the evidence to have been so worn that it was light in weight, or not distinguishable as a genuine dime. If no limitation is put upon its circulation by the government, it would seem none was intended, so long as it was not defaced, cut, or mutilated, and was only made smooth by constant and long-continued

handling, and by being circulated as a part of the national currency."

The question as to what treatment, usage, or acts amount to mutilation of coins was before the court in United States v. Lissner (C. C.) 12 Fed. 840, and the court in that case hold: "Where a coin which had been regularly coined at the mint was afterwards punched and mutilated and an appreciable amount of silver removed from it, and the hole plugged up with base metal, or any substance other than silver, it is an act of counterfeiting; but it is otherwise where the hole was punched with a sharp instrument, leaving all the silver in the coin, though crowding it into a different shape."

Now in this case, as in the five-cent piece or nickel, the bruise and the crack may have been caused by a blow from a hammer or other heavy instrument, but it retains all of its material and all of the evidences of genuine coinage, though the material is very slightly "crowded into different shape." There is not such mutilation, defacing, punching, or cutting as to deprive it of its legal tender character within any of the rules laid down in the authorities or the statute. The law does not require that minor coins, tendered in payment of debt, or for service which the person making the tender has the right to demand, shall be absolutely perfect.

[3] It is contended by defendant in error that, so long as a coin is in such condition that it would be redeemed by the United States government, it does not lose its legal tender character. The trial court appears to have adopted this as a reasonable test by which to determine the question. The United States statutes provide that the Treasury Department may prescribe rules by which coin and paper money which may become unfit for circulation may be redeemed or exchanged, and such rules have been so prescribed. One of the provisions is that "pieces that are stamped, bent or twisted out of shape or otherwise imperfect, but showing no material loss of metal will be redeemed."

We do not think that the existence of this rule, even though adopted under sanction of the statute, would justify the tender of a coin which "had become unfit for circulation," and thus impose on the payee the burden of applying to the Treasury Department for a coin fit for circulation, nor to impose on him the risk of failing to obtain it. This view, in a case where a piece had been torn from a one-dollar bill, was adopted by the court in North Hudson Ry. Co. v. Anderson, 61 N. J. Law 248, 39 Atl.

905, 40 L. R. A. 410, 68 Am. St. Rep. 703. In this case we think the evidence shows the coin was not so affected in any manner as to be deprived of its legal tender character, and therefore the court did not err in its charge to the jury in that regard.

We find no error in the record, and the judgments of the courts below will be affirmed.

Judgment affirmed.

SPEAR, C. J., and DAVIS, SHAUCK, BRICE, and DONAHUE, JJ., concur.[9]

4

RIGHTS IN STOLEN MONEY.

MERCHANTS' LOAN & TRUST CO. v. LAMSON et al.

90 Ill. App. 118. 1889.

The facts are stated in the opinion.

SEARS, J.—This suit was brought in assumpsit by appellant, a banking corporation, to recover money alleged to have been wrongfully taken from appellant by one of its receiving tellers, and paid by him to appellees for losses in speculative deals and trades in grain, stocks, provisions, etc., made through appellees as brokers upon the New York Stock Exchange and on the Board of Trade of the city of Chicago.

One Ross C. Van Bokklen was teller of appellant. In 1892, having received from the estate of his father some $2,000, he began trading through appellees' firm, who were commission men or brokers, doing business on the Chicago Board of Trade and the New York Stock Exchange. He was well acquainted with one E. R. Shaw, an employee of appellees, and Shaw was aware of the position held by Van Bokklen in the appellant bank. Van Bokklen took from the moneys of appellant large sums, amounting, as it is claimed, to $10,000, and lost the same in deals in grain, stocks and provisions made through appellees as his brokers.

The theory upon which appellant sought to recover from appellees these moneys, thus embezzled by its employee, is, that appellees were in possession of knowledge of facts which should have put them upon inquiry which would have led to knowledge of the source from which Van Bokklen obtained the money thus

[9] See Childs' Personal Property, § 50.

paid by him to appellees as his agents and brokers. * * * Upon plea of general issue the cause was tried with a jury and resulted in a verdict and judgment thereon for appellees. * * *

While it is true that appellees, through their employee, Shaw, were aware that Van Bokklen was a teller in the appellant bank, yet there is no evidence in this record which establishes that appellee had any actual notice or knowledge of the fact that Van Bokklen was stealing from appellant the moneys which he was investing through appellees. The rule of law which applies in this state, and which controls upon the facts here presented, is that even if money transferred to an honest taker was obtained by the one transferring it through a felony, yet the honest taker, who received it without knowledge of the felony and in due course of business, would acquire good title as against the one from whom it had been stolen. Jones v. Nellis, 41 Ill. 482; Comstock v. Hannah, 76 Ill. 530; Shreeves v. Allen, 79 Ill. 533; Murray v. Beckwith, 81 Ill. 43; Matson v. Alley, 141 Ill. 284; Bemis v. Horner, 165 Ill. 347; Hopkins v. Withrow, 42 Ill. App. 584; Webber v. Ind. Nat. Bank, 49 Ill. App. 336; Gray v. Goode, 72 Ill. App. 504; Kent v. Barnes, 72 Ind. 617.

In most of the cases above cited, the rule is applied to commercial paper, but the same rule applies with even greater force to currency. Indeed, the rule as applied to negotiable paper is derived from and based upon the English rule as originally applied to coin or other forms of currency. The exception to the general rule of the common law that the purchaser of a chattel can acquire no better title than the vendor, was first applied to money, *i. e.*, currency, and then extended in its application to negotiable paper. Anonymous, 1 Salk. 126; Miller v. Race. 1 Burr. 452; Lawson v. Weston, 4 Esp. 56.

In Miller v. Race, *supra,* Lord Mansfield said: "The true reason is upon account of the currency of it; it can not be recovered after it has passed in currency."

The rule which in Miller v. Race, supra, was applied to a bank note, was extended in Lawson v. Weston, supra, to apply as well to a bill of exchange.

In Jones v. Nellis, *supra,* the Supreme Court of this state, at an early day, applied the same rule by like reasoning to negotiable paper, a doctrine consistently maintained down to the most recent decision in Bemis v. Horner, 165 Ill. 347.

Under a practical application of this rule, mere ground of suspicion of defect of title, or knowledge of circumstances which

would excite such suspicion in the mind of a prudent man, or gross negligence on the part of the taker, will not defeat title. Bad faith alone will defeat the right of the taker without knowledge. The test is honesty and good faith—not diligence. Comstock v. Hannah, *supra.*

Measured by these rules, it is clear that the verdict, finding the issues for appellees, is sustained by the facts of the case here presented. Appellees are not shown to have had knowledge of the theft by which the moneys in question were obtained. At most it can only be said that there were grounds of suspicion, or that they were guilty of some degree of negligence. No bad faith upon the part of appellees can be predicated upon these facts. They took the money in the due course of business, and it had no earmarks. The judgment is affirmed.[10]

[10] See Childs' Personal Property, § 51.

CHAPTER IV.

CHOSES IN ACTION.

5

NATURE OF

CITY OF CINCINNATI v. HAFER.

49 Ohio St. 60, 30 N. E. 197. 1892.

The facts are stated in the opinion.

DICKMAN, J.—This proceeding in error is instituted to reverse a judgment rendered by the circuit court of Hamilton county against the city of Cincinnati, on an appeal by the city from a judgment in the court of common pleas in favor of George Hafer, defendant in error, and by him recovered in a suit in the nature of a creditors' bill. There was a finding of facts by the circuit court, from which the following are shown to have existed: On the 31st day of May, 1880, George Hafer, on cross-petition in the case of Charles S. Woodruff v. H. B. Teetor et al., recovered a judgment, by the consideration of the court of common pleas, against Sarah L. C. Teetor, wife of H. B. Teetor, for the sum of $301.01, with interest at 8 per cent per annum from May 10, 1880, upon which judgment no execution was ever issued. At the time of the recovery of this judgment, a suit, begun in the year 1879, was pending in the court of common pleas, in which Mrs. Teetor, as plaintiff, claimed damages from the city of Cincinnati, as compensation for a loss sustained by her in consequence of the drainage of sewage from the city infirmary upon her land. On the 20th day of November, 1880, Mrs. Teetor having no personal or real property subject to levy on execution sufficient to satisfy Hafer's judgment, Hafer commenced this suit, in the nature of a creditors' bill, in the court of common pleas, against Mrs. Teetor and the city of Cincinnati, in order to subject to the payment of his judgment so much as would be sufficient out of the indebtedness of the city to her by reason of the loss by her sustained from drain-

age upon her land, as above stated. Soon after the commencement of this suit, a general demurrer to the petition in Mrs. Teetor's action against the city was sustained by the court, and leave was given to her to file an amended petition therein. It was not done within the time fixed by the court, and not until June, 1884, when, by leave of the court, an amended petition was filed, which set out the original cause of action, though in a different manner from the original petition. Mrs. Teetor thereupon, to-wit, in June, 1884, assigned to A. S. Miller and Sarah Cilley her claim against the city, then in litigation. The city failed to answer the amended petition of Mrs. Teetor, and, on the trial of the issue thus made she recovered, in October, 1886, on her original cause of action, a judgment against the city for $1,102; and, shortly after the recovery of such judgment, the city solicitor then in office paid the full amount thereof to her assignees, without any knowledge of the pendency of Hafer's suit against the city,—the records and the dockets showing the same having been burned with the Hamilton county court-house in March, 1884. In Hafer's suit against the city of Cincinnati, the city, in December, 1880, filed an answer which was a general denial, but nothing further was done in the suit until after the burning of the court-house, in which all the papers in the cause were destroyed, when, in March, 1887, the counsel for Hafer, hearing for the first time of the judgment against the city in favor of Mrs. Teetor, obtained leave and filed a copy of Hafer's original petition; and the city filed an answer thereto, to which answer there was a reply, and the court of common pleas, in July, 1887, upon the pleadings and the evidence, gave judgment against the city. On appeal by the city, the circuit court found that Hafer was entitled to a decree against the city for a balance due to him from Mrs. Teetor on his judgment against her, viz., for the sum of $449.15, with interest at 8 per cent. per annum, and the costs in the action, and rendered judgment against the city accordingly.

The main question arising on the record is whether Mrs. Teetor's demand against the city for unliquidated damages was of such a nature that, before it was reduced to judgment, Hafer, a judgment creditor, could, by suit in the nature of a creditors' bill against her and the city of Cincinnati, acquire a lien in equity on her interest in such demand, and become entitled to payment of the same, in the event of succeeding in his suit. It is contended that the demand of Mrs. Teetor against the city was for damages unliquidated growing out of a tort, and was not, therefore, until reduced to judgment, such an interest as might, under

the statute, be subjected by the judgment creditor to the payment of his judgment. It is provided by section 5464 of the Revised Statutes that, "when a judgment debtor has not personal or real property subject to levy on execution sufficient to satisfy the judgment * * * any interest he has in * * * any money contract, claim, or chose in action, due or to become due to him, or in any judgment or order, or any money, goods, or effects which he has in the possession of any person, or body politic or corporate, shall be subject to the payment of the judgment, by action." Mrs. Teetor's demand for damages, on account of injury to her land, did not, it is true, rest on a money contract, but it was nevertheless a chose in action. While by a "chose in action" is ordinarily understood a right of action for money arising under contract, the term is undoubtedly of much broader significance, and includes the right to recover pecuniary damages for a wrong inflicted either upon the person or property. It embraces demands arising out of a tort, as well as causes of action originating in the breach of a contract. As said by Judge SHARSWOOD, in a note to a passage in 2 Bl. Comm. 396: "There is a very large class of choses in action which arise *ex delicto*. My claim for compensation for any injury done to my person, reputation, or property is as truly a chose in action as where it is grounded on a breach of covenant or contract." A thing in action, too, is to be regarded as a property right. One of the well-recognized divisions of personal property is into property in possession and property or choses in action. "A leading distinction, in respect to goods and chattels, is the distribution of them into things in possession and things in action. The latter are personal rights not reduced to possession, but recoverable by suit at law. * * * Damages due for torts are included under this general head or title of things in action." 2 Kent. Comm. 351. By section 4975 of the Revised Statutes it is provided that, "in addition to the causes of action which survive at common law, causes of action * * * for an injury to real or personal estate * * * shall also survive; and the action may be brought notwithstanding the death of the person entitled or liable to the same." And it was held in Grant v. Ludlow, 8 Ohio St. 1, that a chose in action which is transmissible to an executor or administrator, under our law, is assignable in equity. Mere personal torts die with the party, and are not assignable; but where the action is brought for damage to the estate, and not for injury to the person, personal feelings, or character, and the right of action survives to the personal representative, it may be assigned so as to

pass an interest to the assignee. Jordan v. Gillen, 44 N. H. 424; Railway Co. v. Goodbar, 88 Ind. 213; Butler v. Railroad Co., 22 Barb. 110; Purple v. Railroad Co., 4 Duer, 74; McKee v. Judd, 12 N. Y. 662; Lazard v. Wheeler, 22 Cal. 139; North v. Turner, 9 Serg. & R. 244; Cass v. Railroad Co., 1 E. D. Smith, 522; Quin v. Moore, 15 N. Y. 435.

Choses in action arising out of a tort or injury to property being transmissible as assets to the executor or administrator, and assignable by the owner, it may well be inquired why the interest which the owner has in such rights of action should not be subjected to the payment of his debts at the suit of a judgment creditor, as well as his interest in any other chose in action. In Hudson v. Plets, 11 Paige, 183, Chancellor WALWORTH said: "The right to an action for an injury to the property of the judgment debtor, before the filing of the complainant's bill, whereby the property to which the creditor was entitled to resort for the payment of his debt is destroyed or diminished in value, appears to be such a thing in action as may properly be reached and applied to the payment of the complainant's debt, under a creditors' bill." A debtor's real and personal property, including pecuniary demands against others for injury thereto, whereby such property is diminished in value, justly constitutes a fund for the payment of his debts; and if the tangible property is taken by one creditor in satisfaction of his claim, another creditor may rightly acquire an equitable lien upon the debtor's interest in the amount which should be paid by the wrong-doer, who has diminished the value, and thereby virtually taken away a portion of the tangible property; nor should the other creditor's right to such recourse be delayed until the debtor, who has begun his action for unliquidated damages, has first reduced his demand to judgment. It is urged that, if Mrs. Teetor had not brought an action against the city for damages, the defendant in error would have had no right to subject any portion of the indebtedness of the city to her, in payment of his judgment. In the present case the facts render it unnecessary to consider whether, if the judgment debtor had not brought suit against the city to enforce her rights, the judgment creditor might, by order of the court, through a receiver, have enforced the rights of the judgment debtor for his (the creditor's) benefit. The statute refers to "any interest in any money contract, claim, or chose in action, due or to become due." When Hafer began the present suit Mrs. Teetor's cause of action existed, and she had already commenced her action against the city; and when her demand for damages was reduced

to judgment in October, 1886, his creditors' bill was still pending in the same court. When, therefore, judgment was rendered in his favor in July, 1887, the damages claimed by Mrs. Teetor from the city had been liquidated, and "become due;" thus indicating that, when Hafer filed his creditors' bill, her demand against the city was a chose in action that was "to become due" or payable, or proper to be paid.

But the statute not only subjects the judgment debtor's interest in any chose in action, but also any interest he has in "any claim due or to become due." The term "claim" is comprehensive, and would embrace a demand for money in varied forms, whether on contract, express or implied, or for damages growing out of injury to person or property. "Damages" have been defined as a sum of money adjudged to be paid by one person to another as compensation for a loss sustained by the latter in consequence of an injury committed by the former. Co. Litt. 257a; Mayne, Dam. 1. If the claim for unliquidated damages is converted into a judgment while the creditors' bill is pending, it may be regarded as a claim, which, at the time of the filing of the creditors' bill to subject it in equity, was a claim "to become due," within the meaning of the statute; and the judgment debtor's interest in the same might be reached by his judgment creditor. * * * Judgment of the circuit court affirmed.[1]

ASSIGNABILITY OF RIGHT OF ACTION FOR PERSONAL INJURY.

NORTH CHICAGO ST. RY. CO. v. ACKLEY.

171 Ill. 100, 49 N. E. 222, 44 L. R. A. 177. 1897.

[This is a bill by one Lemuel M. Ackley against the defendant street railway company which resulted in a decree for the complainant. The defendant appeals.

The facts, as stated by Mr. Justice CRAIG in a dissenting opinion are, in substance, as follows: That the complainant was an attorney at law; that Mary Butler had received certain personal injuries through the negligence of the defendant (the appellant here) while alighting from a cable car; that Mary Butler had a cause of action against the railway company, and, being desirous of obtaining the services of an attorney without advancing any attorney's fees

[1] See Childs' Personal Property, § 52.

therefor, entered into a written agreement with said complainant whereby he was to undertake the prosecution of her case for one-half the gross amount which might be received or recovered in judgment against the railway company. To secure payment of said fee, Mary Butler assigned to Ackley one-half of said right of action. Mary Butler further agreed not to compromise or settle said claim, or to have any dealings with any person in reference thereto other than said attorney. Ackley commenced suit and had the same set for trial; that while in the trial docket, the railway company, without the knowledge or consent of complainant, settled the cause with Mary Butler, procured the cause to be called up and out of its order, and had a judgment entered therein in favor of Mary Butler for $3,750 and costs, which sum was paid to Mary Butler, and she satisfied the judgment of record. It is further alleged that prior to making said settlement, the railway company had full knowledge and notice of said contract in writing of the employment of Ackley and of the services rendered by him. The railway company and Mary Butler each refused to pay the complainant $1,875, the amount due him for his services. On motion of the complainant, a decree was entered in his favor for said amount, together with costs and the defendant appealed.]

PHILLIPS, C. J.— * * * The material inquiry therefore is: First, whether a right of action for personal injuries is assignable; and, second, whether a contract by which the control of the party in interest over litigation carried on in his name or in his behalf is prevented is void. By the common law, actions arising out of torts did not in general survive. The statute of this state has materially changed the rule with reference to actions which survive; and it is now the general rule in this country that causes of action arising from torts to property, real or personal, or injuries to the decedent's estate, by which its value is diminished, survive and go to the executor, and are assets in his hands, and such causes of action are assignable. But it is usually held that torts to the person or character, when the injury or damage is confined to the body or feelings, or which produce direct injury and damage both mentally and to the person, are, so long as they are executory, not assignable. The controversy here is whether an action for personal injuries is assignable. Appellee contends it is.

Numerous authorities are referred to by counsel for appellee, which lay down the rule that, in many cases of torts to property, causes of action may be assigned, and of those cases we cite: * * * Robinson v. Weeks, 6 How. Prac. 161, was an action for

taking and converting personal property brought by assignee, and it was held that the assignment was good. Hall v. Railroad Co. 1 Disn. 58, was a case that decided that, under the Ohio Code, an assignee of a claim for damages resulting from injuries to personal or real estate may bring an action in his own name. Moore v. Massini, 32 Cal. 590, was a case where it was held that a claim for damages caused by a trespass on land is assignable. * * * Fried v. Railroad Co., 25 How. Prac. 285, holds that the right of action for carelessly and negligently setting fire to, and burning up, grass, fences, and hay upon a farm, is assignable. Vimont v. Railway Co., 64 Iowa, 513, 17 N. W. 31, and 21 N. W. 9, was a case in which there was an assignment of the right of action for personal injuries to a resident of Iowa, by a nonresident; and the question arose as to the validity of the assignment, in a motion to transfer the case to the United States court; and the court held such assignment was good, on the strength of Gray v. McCallister, 50 Iowa, 497. * * * Brady v. Whitney, 24 Mich. 154, was an action in trover, brought by a purchaser of a melodeon after the conversion, and the question was whether this sale constituted an assignment of the right to sue. The court held that a right of action in trover is assignable. * * * Final v. Backus, 118 Mich. 218, was a case in which the court holds that a right of action for conversion of logs is assignable. * * * Stewart v. Railway Co., 62 Tex. 246, was a case in which it was held that an unliquidated claim for personal injury cannot be assigned by the party injured in Texas. The court approves Railroad Co. v. Freeman, 57 Tex. 156, and holds, as there was no survival, there could be no assignment of the action for personal injuries. * * * Chouteau v. Boughton, 100 Mo. 406, 13 S. W. 877. The question involved in this case was whether a right of action for trespass to realty was assignable, and the court held that it was, and followed the case of Snyder v. Railway Co., 86 Mo. 613. This latter case was an action brought against the railroad company for killing a hog, which had strayed through a defective fence; and it was held that such a right of action might be assigned, as it would survive the death of the owner under the Code.

All these cases—and many others might be cited—sustain the principle that causes of action for injuries to property, real or personal, by which an estate is diminished, are generally assignable. On grounds of public policy, the sale or assignment of actions for injuries to the person are void. The law will not consider the injuries of a citizen whereby he is injured in his person to be, as

a cause of action, a commodity of sale. On other grounds, assignability is not legal. * * * Pomeroy, in his work on Equity Jurisprudence, says (section 1275): "It becomes important, then, in fixing the scope of the equity jurisprudence, to determine what things in action may thus be legally assigned. The following criterion is universally adopted: All things in action which survive and pass to the personal representatives of a decedent creditor as assets, or continue as liabilities against the representatives of a decedent debtor, are, in general, thus assignable. All which do not thus survive, but which die with the person of the creditor or of the debtor, are not assignable. The first of these clauses, according to the doctrine prevailing throughout the United States, includes all claims arising from contract, express or implied, with certain well-defined exceptions, and those arising from torts to real or personal property, and from frauds, deceits, and other wrongs, whereby an estate, real or personal, is injured, diminished, or damaged. The second class embraces all torts to the person or character where the injury and damage are confined to the body and the feelings; and also those contracts, often implied, the breach of which produces only direct injury and damage, bodily or mental, to the person, such as promises to marry, injuries done by the want of skill of a medical practitioner, contrary to his implied undertaking, and the like; and also those contracts, so long as they are executory, which stipulate solely for the special personal services, skill, or knowledge of a contracting party." Here is a distinction clearly drawn between injuries to property and injuries to the person. This distinction rests on a sound principle. If a person receives injuries to his person through any negligence of another, they are by our statute (section 123 of chapter 3), made to survive. By chapter 70, where death results from such injuries caused by such negligence of another, the action shall survive, but is brought for the exclusive benefit of the widow and the next kin. The administrator cannot recover damages for the estate, and at the same time recover for the exclusive benefit of the widow. Statutes like chapter 70 are in force in most of the states. May a person injured assign the cause of action immediately after his injury, and then, in case of his death from that injury, legally make that assignment bar a recovery by the administrator for the exclusive benefit of the widow and next of kin? The purpose of chapter 70 was not for the benefit of a deceased person, but for that of the widow and next of kin. If an assignment on the basis of the survival of the action was the sole test, then, in the case mentioned, the assignment would be

valid. But the very purpose of the survival, as created by the statute, is for the benefit of the widow and next of kin, which the law would not permit to be defeated. Whether the action be for assault and battery or injuries caused by the negligence of another, still the same rule obtains and is included by the term "actions for injuries to the person;" and, as a possible result of such an assignment, the purpose of the law might be defeated. Courts have, without any exception, steadily held that an action for injuries to the body was not assignable. These actions did not survive at common law, and statutes providing for such survival have had their birth since the passage of Lord Campbell's act, in 1846, which, by chapter 70 of our Revised Statutes, is substantially adopted. If such actions are held assignable, on the sole ground of survival, then an assignee in bankruptcy or for the benefit of creditors would take the cause of action.

This principle, that actions for personal injuries are not assignable, is well sustained by authority. In Rice v. Stone, 1 Allen 566, it was held that an assignment of a claim for personal injuries is void, although made after verdict, but before judgment, in an action to recover damages for such injury. The court says: "Such claims were not assignable at common law. On the contrary, a possibility, right of entry, thing of action, cause of suit, or title for condition broken, could not be granted or assigned over at common law. * * * But this ancient doctrine has been greatly relaxed. Commercial paper was first made assignable to meet the necessities of commerce and trade. Courts of equity also interfered to protect assignments of various choses in action; and, after a while, courts of law recognized the validity of such assignments, and protected them, by allowing the assignee to use the name of the assignor for enforcing the claim assigned. And, at the present day, claims for property and for torts done to property are generally to be regarded as assignable, especially in bankruptcy and insolvency. There may be exceptions to this doctrine, but they need not be discussed here. But, in respect to all claims for personal injuries, the questions put by Lord Abinger in Howard v. Crowther, 8 Mees. & W. 603, are applicable: * * * 'Has any court of law or equity ever sanctioned a claim by an assignee to compensation for wounded feelings, injured reputation, or bodily pain, suffered by an assignor?' * * * In Prosser v. Edmonds, 1 Younge & C. Exch. 481, it was said that a bare right to file a bill in equity for fraud was not assignable. Lord Chief Baron Lyndhurst remarked that courts of equity had relaxed the ancient rule as to the assign-

ment of choses in action, 'but only in the case where something more than a mere right to litigate has been assigned.' This constitutes a very important limitation." This case was followed in Linton v. Hurley, 104 Mass. 353; in Coughlin v. Railroad Co., 71 N. Y. 446, where one having a claim against a railroad company for personal injuries accepted an offer from certain attorneys to take the claim for collection, and divided the recovery. Afterwards the railroad company, with notice of the attorneys' interest in the cause of action, settled with the claimant, and secured a release. In holding that the release was a bar to the action for negligence, and that the attorneys could not demand that the action proceed so that they might have the benefit of their agreement (which we shall notice hereafter), the court say, citing the preceding cases: "So, if the cause of action before judgment be in its nature assignable, the owner of it may assign, and, by agreement, create, legal and equitable interests therein; and such agreements may now be made with his attorneys, as well as with other persons; and when such interests have been created, and notice given of them, they must be respected. But * * * when the cause of action is like this, such as by its nature is not assignable, the party owning it cannot, by any agreement, give his attorney or other person any interest therein,"—citing People v. Tioga Common Pleas, 19 Wend. 73, and Pulver v. Harris, 62 Barb, 500, 52 N. Y. 73. * * * The only exception to this rule is the case of Vimont v. Railroad Co., 69 Iowa, 296, 22 N. W. 906, and 28 N. W. 612, which has been followed by other cases in that state. We do not think the reasoning on which these decisions are based is sound, and we decline to follow them.

The second proposition to be determined is: Is a contract by which the person in whose name the action is brought, and to whom it belongs, restricted from compromising or settling such claim because of a contract to that effect? In other words, is such a contract valid and binding? The law does not discourage settlements in cases for personal injuries. When a cause of action exists, its nature and amount are always involved in uncertainty, and a defendant has a right to buy his peace. The plaintiff has a right to compromise and avoid this anxiety, resulting from a cause pending to which he is a party. Any contract whereby a client is prevented from settling or discontinuing his suit is void, as such agreement would foster and encourage litigation. Lewis v. Lewis, 15 Ohio, 715. * * * The decree of the superior court of Cook county, and the judgment of the appellate court of the First Dis-

trict, are each reversed, and the cause is remanded, with directions to dismiss the bill. Reversed and remanded, with directions.[2]

MAGRUDER, J. and CRAIG, J., dissent.

[2] In many states, perhaps the majority, a right of action for personal injury is assignable by statute. Such a right is assignable in Michigan. Grand Rapids & I. R. R. Co. v. Cheboygan Circuit Judge, 161 Mich. 181, 126 N. W. 56, 137 Am. St. Rep. 495. As to what actions for personal tort survive and are assignable, consult the statutes of your own state.

A corporation cannot bring an action *ex delicto* for a purely personal tort, nor can it be awarded purely personal damages. Hanson Mercantile Co. v. Wyman, Partridge Co. et al., 105 Minn. 491, 117 N. W. 926, 21 L. R. A. (N. S.) 727.

A married woman may not bring an action in her own name for a purely personal tort. Gibson v. Gibson, 43 Wis. 23, 28 Am. Rep. 527. (Changed by statute.)

Contra: Berger v. Jacobs, 21 Mich. 215.

See Childs' Personal Property, § 53.

CHAPTER V.

PATENTS, COPYRIGHT, GOODWILL, TRADEMARKS, AND TRADENAMES.

PATENTS.

Requisites.

(a) NOVELTY.

ANSONIA BRASS & COPPER CO. v. ELECTRICAL SUPPLY CO.

144 U. S. 11, 12 Sup. Ct. Rep. 601. 1892.

The facts are stated in the opinion.

STATEMENT BY MR. JUSTICE BROWN.

This was a bill in equity for the infringement of letters patent No. 272,660, issued February 20, 1883, to Alfred A. Cowles, for an "insulated electric conductor."

In his specification the patentee stated that, "before my invention, copper wires had been covered with one or two braidings of cord; and paraffine, tar, asphalt, and various substances had been employed for rendering the covering water-proof and furnishing a proper insulation. With conductors of this character several accidents occurred in consequence of the conductor becoming heated and setting fire to the insulation. For this reason objections were made to insuring buildings against loss by fire where electric lamp wires were introduced. To render the conductor fireproof without interfering with the insulation led me to invent and manufacture the insulated electric conductors to which the present invention relates, which conductors have gone extensively into use during about a year and a half before the date of this specification."

Upon a hearing upon pleadings and proofs in the circuit court plaintiff's bill was dismissed, (32 Fed. Rep. 81, and 35 Fed. Rep. 68), and an appeal taken to this court.

Mr. Justice BROWN, after stating the facts, delivered the opinion of the court.

The stress of this case is upon the questions of patentable novelty. The art of insulating electric wires has been known almost as long as that of conducting electricity for practical purposes by means of wires. Prior to the use of electricity for lighting, however, the feeble character of the currents conveyed upon these wires did not require that the insulating material should be noncombustible, and the skill of the inventor was directed towards a method of insulation which should protect the wire from moisture and other external injury. For this purpose the wires were covered with braid which had been saturated or covered with tar, paraffine, India rubber, gutta-percha, asphaltum, and various substances of like nature, to exclude the action of the water, and afford a proper insulation.

Upon the introduction of electric lighting it was found that this method of insulation, while efficient to protect the wire from external influences, was unable to withstand the intense heat frequently generated in the wire itself by the powerful currents of electricity necessary for illuminating purposes. At first these wires were covered with cotton, which had been saturated in paraffine and other similar substances. The result was that the insulating material was melted, or set on fire, and dropped off the wire while still burning, and became so frequently the cause of conflagrations that the insurance companies declined to issue policies upon buildings in which this method of insulating wires was employed. A new substance was needed, which would not only operate as a non-conductor of electricity, and as a protection against moisture, but which should also be non-combustible.

This material was discovered in ordinary paint. Mr. Cowles was not the first, however, to discover that paint was useful for the purpose of insulating electric wires. In several English patents put in evidence paint is suggested as a proper covering for protective as well as for insulating purposes, in lieu of gutta-percha, India rubber, resin, pitch, or other similar substances; but, as a non-combustible insulator was never required for telegraphing purposes, there is no intimation in any of them that it possessed this quality. It had, however, been a matter of common knowledge for many years that paint was practically non-combustible. While the linseed oil in paint is to a certain extent combustible, the carbonate of lead is a material both non-combustible and a non-conductor.

It is clear that none of these English patents can be claimed as anticipations, since they all relate to the protection of land or submarine telegraph cables and the use of paint, so far as it was used at all, was simply as a water-proof covering for a braided wire. There is nothing to indicate that the paint, as used by them, was applied in the manner indicated by the patent, or that it made the covering non-combustible, or was intended at all for that purpose.

The most satisfactory evidence of the use of a non-combustible covering for electric wires is found in the testimony of Edwin Holmes, manufacturer of an electric burglar alarm, who states that when he first commenced using electric conductors "the wire was insulated by winding a thread, larger or smaller, as the case might be, around the wire, and that thread was covered with paint," and that all his wires were "insulated in that way until paraffine was substituted for the paint." The paint was applied by drawing the wire through a vessel containing the paint, and then through a piece of thick rubber or gutta-percha, which removed the surplus paint and left a smooth surface on the thread which covered the wire. He began to cover his wires in this way as early as 1860, and says that he accomplished his insulation "sometimes by covering the wire with a thicker thread and two coats or more of paint; sometimes by a thread covering and a coat of paint, then another thread covering and a coat of paint on that." * * *

Practically the only difference between the Holmes and Cowles insulators is in the fact that the coat of paint applied to the first braid in the Holmes process was allowed to dry before the second coat of braid was applied, and thereby the braid was not so thoroughly permeated with the paint as is the case in the Cowles patent. That the idea of applying the second coat of braiding upon the interposed insulating material, while such material was wet or unset, is not in itself a novel one, is evident from the English patents to Brown and Williams, to Duncan and to Henley, all of which describe a method for insulating conductors by applying a layer of fibrous material, a layer of insulating material, and a second layer of fibrous material upon the former, before the insulating material is set or hardened. * * * But, however this may be, the method described by Cowles differs only in degree, and not in kind, from that described by Holmes. In other words, it is a more thorough doing of that which Holmes had already done, and therefore involving no novelty within the meaning of the patent law. * * *

In the case of Gandy v. Belting Co., 12 Sup. Ct. Rep. 598,

(recently decided), the patentee found that the canvas theretofore manufactured was unfit for use as belting by reason of its tendency to stretch, and to obviate this he changed the constitution of the canvas itself by making the warp threads heavier and stronger than the weft; in short, he made a new canvas, constructed upon new principles, and accomplishing a wholly new result. That case is not a precedent for this.

It is true that the insulator used by Holmes was not intended to be, and perhaps was not known to be, incombustible, since this feature of its incombustibility added nothing to its value for protecting a burglar-alarm wire, which carries a current of comparatively low tension; but, as already observed, the testimony indicates that the insulator employed by him was in fact nearly, if not quite, as incombustible as that made by the plaintiff under the Cowles patent. If this be so, and the two insulators are practically the same in their method of construction, it is clear that Cowles has no right to claim the feature of incombustibility as his invention, since nothing is better settled in this court than that the application of an old process to a new and analogous purpose does not involve invention, even if the new result had not before been contemplated. It was said by Chief Justice WAITE in Roberts v. Ryer, 91 U. S. 150, 157, that "it is no new invention to use an old machine for a new purpose. The inventor of a machine is entitled to all the uses to which it can be put, no matter whether he had conceived the idea of the use or not."

In Pennsylvania Railway v. Locomotive Truck Co., 110 U. S. 490, 494, the adoption of a truck for locomotives, which allowed a lateral motion, was held not to be patentable, in view of the fact that similar trucks had been used for passenger cars. All the prior cases are cited, and many of them reviewed, and the conclusion reached that "the application of an old process or machine to a similar or analogous subject, with no change in the manner of application and no result substantially distinct in its nature, will not sustain a patent, even if the new form of result had not before been contemplated." The principle of this case was expressly approved and adopted in that of Miller v. Foree, 116 U. S. 22, 6 Sup. Ct. Rep. 204, and has been frequently applied in the administration of patent law by the circuit courts. Crandall v. Walters, 20 Blatchf. 97, 9 Fed. Rep. 659; Ex parte Arkell, 15 Blatchf. 437; Blake v. San Francisco, 113 U. S. 679, 5 Sup. Ct. Rep. 692; Smith v. Elliott, 9 Blatchf. 400; Western Electric Manuf'g Co. v. Ansonia Brass & Copper Co., 114 U. S. 447, 5 Sup. Ct. Rep. 941; Spill

v. Celluloid Manuf'g Co., 22 Blatchf. 441, 21 Fed. Rep. 631; Sewall v. Jones, 91 U. S. 171.

On the other hand, if an old device or process be put to a new use, which is not analogous to the old one, and the adaptation of such process to the new use is of such character as to require the exercise of inventive skill to produce it, such new use will not be denied the merit of patentability. That, however, is not the case here, since the Cowles process had been substantially used by Holmes for the same purpose of insulating an electric wire, and the discovery of its incombustible feature involved nothing that was new in its use or method of application.

The utmost that can be said for Cowles is that he produced a somewhat more perfect article than Holmes; but, as was said by this court in Smith v. Nichols, 21 Wall. 112, 119, "a mere carrying forward, or new or more extended application of the original thought, a change only in form, proportions, or degree, the substitution of equivalents, doing substantially the same thing in the same way by substantially the same means, with better results, is not such invention as will sustain a patent." It was held in this case that where a textile fabric, having a certain substantial construction, and possessing essential properties, had been long known and in use, a patent was void when all that distinguished the new fabric was higher finish, greater beauty of surface, the result of greater tightness of weaving, and due to the observation or skill of the workman, or to the perfection of the machinery employed. See, also, Morris v. McMillin, 112 U. S. 244, 5 Sup. Ct. Rep. 218; Bussell Trimmer Co. v. Stevens, 137 U. S. 423, 11 Sup. Ct. Rep. 150, and cases cited.

The decree of the circuit court is therefore affirmed.[1]

Mr. Justice FIELD dissented.

(b) MUST BE USEFUL.

NATIONAL AUTOMATIC DEVICE CO. v. LLOYD et al.

40 Fed. 89, 5 L. R. A. 784. 1889.

The facts are stated in the opinion.

BLODGETT, J.—Complainant moves for an injunction *pendente lite* in this case. The bill charges the infringement of patent No.

[1] See Childs' Personal Property, §§ 75, 77, 78.

410,981, granted to Fred N. Lang, on the 10th day of September, 1889, for a "Toy Automatic Race-Course," and contains the usual prayer for an injunction and accounting. The device covered by the patent is a shaft projecting upwards from the center of the base of a circular shell or case, from 15 to 18 inches in diameter, to which shaft a clock-work mechanism is so geared that it can be made to revolve rapidly by releasing the escapement of the clock-work. On this shaft are mounted two or more radial arms, to the ends of which are attached small toy figures of horses. These radial arms are attached to the shaft by separate collars so loose that they turn easily on the shaft. The clock-work escapement is released by dropping a nickel coin through a slot in the machine, whereupon the shaft commences to revolve rapidly, carrying the radial arms with it, but, after a certain number of revolutions, the force of the clock-work is cut-off, and the radial arms continue to revolve, from the *momentum* they have obtained while the clock-work was going, until such arms finally stop from friction and the resistance of the air. Several objections are urged against the motion for an injunction, such as that the bill is multifarious, non-infringement, etc., which I do not deem it necessary to consider, as it seems to me there is sufficient reason on another ground for withholding the injunction. The proof shows that the only use to which complainant's, or, for that matter, the defendants', machines, have been so far applied, is to place them in saloons, bar-rooms, and other drinking places, where the frequenters of such places make wagers as to which of the toy horses will stop first, or which will stop nearest to a designated point, after the machine has been put in motion, by dropping a nickel in the slot; in other words, the machine in question is only used for gambling purposes. The law of the United States only authorizes the issue of a patent for a new and useful invention, and in an early case on that subject (Bedford v. Hunt, 1 Mason, 302) it was held that the word "useful," as used in this statute, means such an invention as may be applied to some beneficial use in society, in contradistinction to an invention which is injurious to the morals, health, or good order of society, and the principle thus enunciated has been uniformly applied ever since. It is urged that this machine is susceptible of being utilized as a toy, or child's plaything; but it is a sufficient answer to this suggestion that no such use has been as yet made. The patent has been very recently issued, and it is possible that a useful application may yet be found for it; but as the case now stands, the only use to which the invention had been put being for gambling pur-

poses, I must hold that it is not a useful device, within the meaning of the patent law, as its use so far has been only pernicious and hurtful. Injunction refused.[2]

(c) PHYSICAL THINGS ONLY.

9

NATIONAL METER CO. v. NEPTUNE METER CO.

122 Fed. 82. 1903.

The facts are stated in the opinion.

ARCHBALD, District Judge.—If the case turned on the question of infringement, there would be no serious difficulty in disposing of it. The defendants are manufacturing two kinds of displacement or nutating meters, each of which offends against one or the other of the patents in suit, if valid. In one the disk of the piston, the inclosing case of the meter chamber, and the seat of the ball, above as well as below, are all made of brass, while the ball itself is of rubber. This escapes the second patent, which calls for the case, ball, and disk to be of metal, and the seat of the ball of a non-metallic material; but it comes within the terms of the first and second claims of the first patent, which in a general way may be said to cover the combination in which the disk and opposing case walls are made of similar materials, and the ball and ball bearings of those that are dissimilar. This is not exact, but it is sufficient for the present purpose. * * *

But the real question in the case is whether the patents in suit are valid, and this requires a somewhat critical examination of them, and what they undertake to cover. The disk of a nutating meter, as first set in place, is given a slight clearance at the rim sufficient to avoid contact with the inclosing case without resultant leakage. But when the piston loses it initial poise by reason of the wear of the ball in its socket, as there is a natural radial thrust by the water in the direction of the outlet port, the disk is liable to be forced into sudden contact at that point with the walls of the case, binding and breaking it, because of its having to take, on the instant, the entire weight of the water head. This is a well-recognized danger, and the patents in suit—notwithstanding some inconsistencies to be found in the record, which I will not stop to discuss—must be regarded as distinctly designed to meet and obviate it.

[2] See Childs' Personal Property, § 79.

This is what was claimed for them on their passage through the Patent Office, and it sufficiently, although more obscurely, appears in the specifications themselves. The method devised by the inventor to remedy the difficulty was not, as might be supposed, by endeavoring to decrease the frictional wear at the periphery of the disk (as is done, for instance, in the Thomson meter, already referred to, by the use of thrust rollers), but, on the contrary, by augmenting it; at the same time providing that the wear at the ball shall be reduced to a minimum, so that with the one going on faster than the other, the original clearance will be maintained. It is stoutly contended by the defendants that this arrangement produces no such practical or beneficial result, but, notwithstanding what is said of it on that side, I am persuaded that it is theoretically correct, and calculated to perform the function claimed for it. The criticism which is so made of it serves to show that the device was by no means obvious, and that it required a certain amount of inventive ingenuity to appreciate and apply it. It is not with this part of the case that I experience any difficulty, but rather with the means employed to realize the invention, and the generalty of the claims formulated to express it.

The claims particularly relied upon in the first patent are as follows:

"(1) In a water meter, a nutating piston, composed of ball and disk combined with a case provided with seats for the piston ball, the disk of the piston and the spherical walls of the case being composed of substances having a larger coefficient of abrasion than the substances composing the ball of the piston and its seats in the case. (2) In a water meter, the disk of a nutating piston and the opposing case walls, made of similar materials, combined with the ball of said piston and the ball bearings in the case, made of dissimilar materials."

The single claim of the second patent is much the same:

"In a water meter, the combination of a piston composed of a ball and disk, both made of metal, with a case made of metal, and a seat for the ball, made of nonmetallic material."

It cannot but be evident that these claims are very highly and broadly generalized, laying them open to the charge that they attempt to patent a mere result or abstraction, rather than a specified means for accomplishing it, which is alone patentable. O'Reilly v. Morse, 15 How. 62, 14 L. Ed. 601. In the first claim the inventor practically monopolizes every means, whether structural or material, by which a relatively greater wear is secured at the rim than goes

on at the center; while the second is not far behind, embracing, as it does, the use of similar, but unspecified, materials at the one place as against dissimilar and unspecified materials at the other. The second patent may be somewhat less broad, but not much so; metal against metal being specified for the one place, and metal against a nonmetallic material for the other. The extended character of these claims is shown by the position taken with regard to them in the evidence. Dr. Morton gives it as his opinion, for instance, that the first patent would be realized wherever, by any means, structural or otherwise, less frictional wear is secured at the seat of the ball than goes on at the rim of the disk. This, as he says, would include the previous Thomson (1891) tapering disk, or the subsequent Nash (1894) knife edge, in the latter of which (a hard rubber disk in a metallic case being retained on account of its lightness) the necessary abrasion is secured by a reduction of area at the rim, as well as by a pointing or sharpening of it; and would even extend to a case in which the abrasion at the ball and seat was rendered less by a permanent lubrication of these parts by a properly maintained film of oil or graphite. In line with this, infringement of the second patent is made out, as we have seen, by the mere introduction in an ordinary all-metal case having an all-metal disk of any well-known and constantly used nonmetallic antifrictional bearing. The patent law was not designed to favor, and does not support, any such sweeping generalities. An inventor is entitled to the benefit of any useful discovery which he may make, be it product, process, or structure, but he must put it into concrete form. The furthest that the courts have gone in upholding as patentable the mere use of materials to produce a desired result is in the case of Smith v. Goodyear Dental Company, 93 U. S. 486, 23 L. Ed. 952, affirmed in Goodyear Dental Company v. Davis, 102 U. S. 222, 26 L. Ed. 149, where a patent for a dental plate of vulcanized rubber for holding artificial teeth is sustained; but even there not only was the material of a composite character, but it was closely identified with the process devised by the inventor, in which it was beneficially employed. There was no claim, as here, for materials, unlimited and undefined, where the only thing specified is that they combine to perform a certain function. This condemns, as it seems to me, not only the first two claims of the first patent, but the single claim of the second patent as well. * * *

Let a decree be drawn dismissing the bill, with costs.[3]

[3] See Childs' Personal Property, §§ 77, 78, 79.

ABANDONMENT.

INTERNATIONAL TOOTH-CROWN CO. v. GAYLORD et al.

140 U. S. 58, 2 Sup. Ct. Rep. 716, 35 L. Ed. 347. 1891.

[A bill to prevent the infringement of a patent for fixing an artificial crown to the roots of a tooth by means of a metal plate and pins. Bill dismissed.]

Further facts are stated in the opinion.

MR. JUSTICE BROWN delivered the opinion of the court.

Prior to the invention of Dr. Richmond, the only method of supplying an artificial for a natural crown, in case the tooth had decayed or broken off, was by what is called a "peg tooth." This was made by drilling the nerve canal larger; then a porcelain tooth with a hole in it was ground to fit the root, and the two were connected together by a wooden or metallic pin or dowel made to fit the hole in the porcelain as well as the hole in the tooth. The operation, however, was very unsatisfactory. * * * It was the object of Dr. Richmond to supersede this method of crowning teeth by a more perfect, cleanly, and durable device.

It is substantially conceded in this case, and was found by the court below, that his patent No. 277,941 describes an invention of great utility in the practice of dentistry, which has been largely adopted by the profession throughout the country, for building upon the roots of decayed teeth artificial crowns. * * *

Gold or other metallic caps were not wholly unknown before the invention of Dr. Richmond. One such, known as the "Morrison Operation," was described in the Missouri Dental Journal of May, 1879. Another is explained in the patent of November 4, 1873, to John B. Beers, who seems to have been the first to make use of a screw or pivot to attach the cap to the root of the tooth. In both of these cement or porcelain enamel was used to fill the cap and secure the necessary adhesion to the root. Two or three other similar devices are shown; but none of them seem to have been attended by any practical success, and neither of them exhibits the combination of the Richmond patent. Indeed, it was scarcely claimed that his invention had been anticipated; and, as infringement of all his claims was admitted, the whole defense practically turned upon the question of abandonment.

The facts bearing upon this defense are substantially as follows: Dr. Richmond began his experiments in fitting a gold collar to the neck of a tooth as early as 1875 or 1876 in San Francisco, and he states himself that he performed the operation described in his principal patent in the mouth of one Kalloch on Christmas of 1876, and, so far as he knew, the operation was entirely successful, and the tooth still remained in the mouth of his patient. He further states in his examination that he practiced this operation extensively in San Francisco, Chicago, Detroit, Cleveland, New York, and New London, and demonstrated it to 500 dentists in private practice and in public clinics. * * *

It is but just to the plaintiff to state in this connection that Richmond appears to have had a quarrel with the treasurer of the plaintiff company in 1883, very soon after the patent was issued to the Richmond Tooth-Crown Company as assignee of the inventor, and that he was called as a witness by the defendants, and apparently testified under a strong bias against the plaintiff; but his evidence regarding the extent of his operations is fortified by a large number of letters from dentists in different parts of the country, written in 1878 and 1879, certifying in strong language to the value of his invention. Indeed, the evidence is that he instructed Dr. Gaylord, one of the defendants in this suit, in the art of making and applying his tooth-crown as early as 1879, performing two operations in Dr. Gaylord's mouth and one in that of a patient, and receiving pay for the same. As the application for the patent was not made until December 1, 1882,—more than two years after all these operations were conducted—the evidence of abandonment is overwhelming if it be once admitted that the operation was identical with that described in the patent, or different from it only in an immaterial particular.

The reply to all this testimony is that the tooth-crowns made prior to the year 1880 were defective, because they were made with an incomplete metallic floor to the ferrule, and for that reason the metal cap or thimble was more or less leaky. There is considerable evidence upon this point; Dr. Gaylord swearing that the operation taught to him was exactly like that which was described in the patent, while the plaintiff's witnesses lay great stress upon the point that the cap was imperfect by reason of the incomplete covering of the root, although in some cases the hole or aperture is admitted to have been microscopic. * * * The controversy as to this patent is thus narrowed to the question whether the substitution of a complete floor over the end of the ferrule, so as to

wholly inclose the end of the natural root, in the place of a partial floor, involves sufficient invention to sustain the patent."

But whether a cap thus constructed be imperfect or not, it is entirely clear that the closing of this alleged hole, which is so small that its very existence is denied, is such a carrying forward and perfection of the original device as would occur to any ordinary dentist, since it is of the very alphabet of dental science that the dentine of a tooth shall be protected as far as possible from the action of food and the fluids of the mouth. There is little doubt that some progress was made between the first operations of Dr. Richmond in San Francisco and that disclosed by his patent; but the real invention was made when the ferrule with the porcelain crown was adopted and applied to the root of a tooth prepared for the purpose of receiving it. All subsequent progress was made on this line and in furtherance of this idea, and was such as would occur to an ordinarily skillful dentist. There is a multitude of cases in this court to the effect that something more is required to support a patent than a slight advance over what had preceded it, or mere superiority in workmanship or finish. Smith v. Nichols, 21 Wall. 112; Atlantic Works v. Brady, 107 U. S. 192, 199, 2 Sup. Ct. Rep. 225; Pickering v. McCullough, 104 U. S. 310.

Nor do we think the use which Dr. Richmond made of his invention can be fairly called experimental. The fact that he taught it to a large number of dentists throughout the country, with no suggestion that it was an experiment, and received pay for such instruction, precludes the defense he now sets up that all this was simply tentative. It was said in Manufacturing Co. v. Sprague, 123 U. S. 249, 256, 8 Sup. Ct. Rep. 126, by Mr. Justice MATTHEWS, speaking for this court: "A use by the inventor for the purpose of testing the machine, in order by experiment to devise additional means for perfecting the success of its operation, is admissible; and where, as incident to such use, the product of its operation is disposed of by sale, such profit from its use does not change its character; but where the use is mainly for the purposes of trade and profit, and the experiment is merely incidental to that, the principal, and not the incident, must give character to the use. The thing implied as excepted out of the prohibition of the statute is a use which may be properly characterized as substantially for purposes of experiment. Where the substantial use is not for that purpose, but is otherwise public, and for more than two years prior to the application, it comes within the prohibition." If, as was said in Fruit Jar Co. v. Wright, 94 U. S. 92, 94, and Egbert

v. Lippmann, 104 U. S. 333, a single instance of sale or of use by the patentee may be fatal to the patent, much more is this so where the patentee publicly performs an operation covered by his patent in a dozen different cities throughout the country, and teaches it to other members of the profession, who adopt it as a recognized feature of their practice. Granting that, under the rule laid down in Elizabeth v. Pavement Co., 97 U. S. 126, a patentee has a right to test the durability of his invention as one of the elements of its success, it is manifest that his experiments to that end should extend no further, either in time or in the number of cases in which it is used, than is reasonably necessary for that purpose. * * *

In preparing his specification Dr. Richmond naturally laid great stress upon the hermetical sealing of the cap; as he must have been satisfied that his first operations constituted a complete abandonment of what he did to the public, and that the entire validity of his proposed patent would depend upon his ability to draw a distinction between his operations as formerly and as then conducted. We are satisfied, however, that his real invention, and the only one to which he was properly entitled to a patent, is such as he put in practice prior to the years 1878 and 1879, and taught so extensively throughout the country. In the light of this testimony we are compelled to hold that this constituted such an abandonment of his claim as to preclude his obtaining a valid patent for it. * * *

The decree of the court below dismissing the bill is, therefore, affirmed.[4]

BREWER, J., did not sit in this case, and took no part in its decision.

[4] The exclusive right to make, use, and vend an invention or discovery does not give to the patentee the right to control the price at which such article may be resold by a purchaser. Bauer & Cie, and The Bauer Chemical Co. v. O'Donnell, 229 U. S. 1, 33 Sup. Ct. Rep. 616, 57 L. Ed. 1041, 50 L. R. A. (N. S.) 1185.

See Childs' Personal Property, § 80.

COPYRIGHT.

Definition—Kinds. Common Law; Statutory.

STATE v. STATE JOURNAL CO.

77 Neb. 752, 110 N. W. 763, 9 L. R. A. (N. S.) 174. 1906.

[*See same case, 75 Neb. 275.*]

[The facts appear to be as follows: The defendant, a printing company, contracted with the State of Nebraska to publish the reports of the supreme court of that state. The plates from which such reports were printed were to belong to and remain the property of the State of Nebraska, and, when the stipulated number of reports (1,000 each) was printed, the plates were to be delivered to the state. The defendant secretly printed and sold copies of said reports for its own use and benefit, thereby violating the relation of trust and confidence reposed in the defendant by the plaintiff. The plaintiff sought to recover damages for the alleged breach of the printing contracts and abuse of the relation of trust and confidence assumed by the defendant as publisher. Defendant demurred and was sustained. Plaintiff appealed.]

SEDGWICK, C. J. When the ruling upon the second demurrer was sustained for the reasons stated in the opinion (106 N. W. 434), a motion for new trial was filed; this being an action brought originally in this court. Upon this motion the Attorney General filed an able and exhaustive brief. * * * In the brief filed and upon the argument the state admits that it has no claim "for infringement of copyrights or for damages for misuse of literary productions."

The position taken by the state upon this point is stated in the brief in these words: "It is correctly stated in the opinion that all persons have a right to publish the decisions of this court. The West Publishing Company does so. It buys copies of the opinions from the reporter of this court. It edits its own manuscripts, sets its own type, makes its own plates, prints its own copies, binds them, and sells them openly to the public." We do not think that the counsel for the state have fully appreciated the quality and force of this admission. * * * The literary matter

involved in these reports became the property of the public before the manuscripts , or any other property of the state, were placed in the hands of the defendant to enable it to carry out the terms of its contract with the state. The syllabi of the opinions are regularly published in the newspapers of the state as soon as the decisions are rendered, and frequently extracts from the opinions, and sometimes the opinions themselves, are also so published. Copies of the opinions as well as the syllabi are furnished to any and all parties desiring them upon payment for copying them, and no attempt is made to preserve any claim on the part of the state in these syllabi or opinions. It was therefore impossible that the defendant should cause any injury to the state by making this matter public.

What interest or right of the state then has been interfered with, or damaged, by the acts of he defendant? The answer of the state's brief is: "The state engaged in the enterprise of publishing the decisions of the Supreme Court for the purpose of creating a fund to buy books for the state library. * * * For the purpose of creating a fund to purchase books for the benefit of the state library the state has by statute made provision for engaging in the business of publishing the Supreme Court Reports. * * * We do not coincide with the view that the main purpose of the statute is to establish a printing and publishing business to make profits with which to replenish the library funds. The purpose would seem rather to be to make the opinions of the court easily realize a profit upon the sale of the reports, and that the intention was to use that profit for the benefit of the library fund. * * *

The proposition is stated in the brief that, when one employs another to manufacture pictures or books for him, the person so employed has no right to make any other copies for his own benefit. Several cases were cited as illustrating this proposition and its application to the case at bar. Pollard v. Photographic Company, 40 L. R. C. D. 352, is one of the cases relied upon. That was an action to restrain the defendant "from selling or offering for sale or exposing by way of advertisement or otherwise a certain photograph of the plaintiff, Alice Morris Pollard, got up as a Christmas card, and from selling or exposing for sale or otherwise dealing with such photograph." The lady was photographed at defendant's shop and paid for a likeness of herself taken from negatives then made. "It was found by the plaintiffs that a photographic likeness of Mrs. Pollard taken from one of the negatives, got up in the form of a Christmas card, was being exhibited in the de-

fendant's shop window at Rochester." In the course of the argument one of the judges remarked: "Injunctions have been granted to restrain a libel." The photograph was a private matter, it never had been published, and the attempt to publish it on the part of the defendant was the injury complained of. The case illustrates the doctrine of the right of privacy. This right of the plaintiff to prevent her photograph from being made public against her wish was so well established in English law that it was unnecessary to discuss that right. The question discussed was whether she had waived that right by employing the photographer to make the negative without at the same time stipulating that he should not publish it, and the court held after much discussion that it was not necessary to make the express stipulation in the contract that they should not be published, that such stipulation would be implied, and this is the whole matter discussed in the case. * * *

In this connection it will be remembered that the author of a manuscript is in this country not obliged to give it to the world. He may keep it as a private matter as long as he does not publish it, and at any time when he decised to publish it he may obtain a copyright thereon; so that, while he holds the matter unpublished, he has a special interest in it which would entitle him to prevent its publication. The English statute gave a similar right to one who was photographed to prevent the photograph from being made public. In the state's brief it is said that this case was followed by the United States Circuit Court of the District of Massachusetts, in Corliss v. Walker, 57 Fed. 436. In that case an injunction was allowed in the suit of Mrs. Corliss to prevent the publication of a picture of Mr. Corliss, who was then deceased. Afterwards a motion was made to dissolve this injunction. This motion was sustained, and, in passing upon this motion, the court said: "But, while the right of a private individual to prohibit the reproduction of his picture or photograph should be recognized and enforced, this right may be surrendered or dedicated to the public by the act of the individual, just the same as a private manuscript, book, or painting becomes (when not protected by copyright) public property by the act of publication." * * *

Another important matter has been overlooked in the plaintiff's discussion. It is mentioned in the opinion of Lindley, L. J. He said: "I am quite aware of the ambiguity of the word 'copyright.' But that which is called 'copyright' at common law has been shown, by the decision of the House of Lords in Jefferys v. Boosey, to be an incident of property, and nothing more. 'Copyright'

under the act is something far beyond that. It is the exclusive right of multiplying copies of a work already published." In the discussion of the case before the divisional court, beginning on page 52 of the same volume, the difficulties which have arisen from this ambiguous use of the word "copyright" are plainly pointed out. The word has sometimes been applied to the "right to publish or to abstain from publishing a work not yet published at all." This is the common-law right which every one has in his own productions, whether they be literary, ornamental, or of a more substantial nature. He may keep them entirely to himself as long as he chooses, and while he does so he has an exclusive right to them, and no person has a right to interfere with them or destroy them. To make them public would be to destroy this right. This right is perhaps not strictly a copyright, but that name has frequently been applied to it, and in the case under discussion it is said by a majority of the court to be a copyright. Whatever it may be called, it is the registering of this right, or in our country the complying with the law in regard to copyright, which preserves the right in the work after it has been published. Unless the copyright laws are complied with, publication works an abandonment of all further right.

Grove, J., of the divisional court, quoted the following language from Lord Brougham: "Whatever may have been the original right of the author, the publication appears to be of necessity an abandonment. As long as he kept the composition to himself, or to a select few placed under condition, he was like the owner of a private road; none but himself or those he permitted could use it. But, when he made the work public, he resembled that owner after he had abandoned it, who could not directly prohibit passengers, or exact from them a consideration for the use of it." A further quotation is made from language used by Lord Brougham in speaking of a copyright in the sense of exclusive right of multiplying copies of a work already published, as follows: "That which was before incapable of being dealt with as property by the common law became clothed by the lawgiver's acts with the qualities of property; and thus the same authority of the lawgiver, but exercised righteously and wisely for a legitimate and beneficent purpose, gave to the produce of literary labour that protection which the common law refused it, ignorant of its existence, and this protection is therefore, in my opinion, the mere creature of legislative enactment."

These pictures had never been published. The court recognized

the right which the designer and maker of the pictures had to keep them for his own private use, and to publish them, or refrain from publishing them, at his pleasure. That right, which was independent of their statute, was violated by the defendant, and the discussion is as to whether under the circumstances there was an implied contract that the defendant should not violate that right. The court found that there was such an implied contract, and so allowed the plaintiff to recover damages. After publication, nothing but compliance with the statute will save the right. This is the ordinary and strictly proper use of the word "copyright"—the right to make it public and still retain the beneficial interest in it. No right remains in a literary production which has been made public, except under the federal copyright act. This is the sense in which the word copyright was used in the former opinion. The fact that the state had dedicated to the public the literary matter embraced in the manuscript furnished to the defendant, by furnishing it to the West Publishing Company for publication, and in various other ways pointed out above, was not denied in the petition, and was understood by all parties. Upon this understanding the case was presented to the court. Upon the theory that his was a private matter, and had never been dedicated to the public, the proposition of law involved in the first paragraph of the former opinion would not be technically correct, and the same might be said of some of the expressions of the opinion.

* * * The state had the right in the manuscripts and in the plates, and the defendant did wrong in using them without the consent of the state, and would be liable under suitable allegations for such injury as the state suffered by reason thereof. The contract between the plaintiff and the state was of such a nature that the agreement on the part of the defendant not to use the plates and manuscripts of the state for such purpose might be reasonably implied, because the defendant had no right to so use them; but we cannot imply from the contract an agreement not to do that which the defendant in common with all other citizens had full right to do. When the contract was made, both parties must have known that the defendant had the right to obtain and publish the opinions of the Supreme Court. There was nothing in the contract inconsistent with that right, and no implication can be drawn from the contract that the defendant renounced or waived that right. The injury to the state, then, is in the use that the defendant has made of the manuscripts and plates, and does not arise from the manufacture and sale of the volumes of the reports, which the defendant

might have done by other means and without the use of the plaintiff's property.

* * * The state has a right to control the use of its own property, and, when by contract it places its property in the hands of its employees for a special purpose, the law, in the absence of anything in the contract to the contrary, will imply an agreement that the property shall be used only for that purpose. This is because any further use of it would violate the right of the state to control its use. This principle cannot extend to the making and selling the reports on defendant's own account, because this did not violate a right of the state. The state could not restrict the right of any citizen to make and sell these reports, because they had been already published, and were not copyrighted. If the state had required the defendant to stipulate in the contract that it would not make and sell any copies of the report on its own account, it may be that such stipulation could have been enforced. The law will not imply such a stipulation in the contract, when in fact none exists, because the state had no private ownership in the literary matter; that private ownership, if any ever existed, having been waived and abandoned by publication. The state therefore had no right that could be violated by making and selling the reports, and there is no basis for the implication of an agreement on the part of the defendant that it would not make and sell reports on its own account.

We think that the judgment heretofore entered is right, and it is adhered to.[5]

[LETTON, J., dissented on the question of contract.]

HOLMES, JR., v. HURST.

174 U. S. 82, 19 Sup. Ct. Rep. 606, 43 L. Ed. 904. 1899.

[Bill in equity by the executor of the will of the late Dr. Oliver Wendell Holmes, praying an injunction against the infringement of the copyright of a book originally published by plaintiff's testator under the title of "The Autocrat of the Breakfast Table." The facts are substantially as follows:

Dr. Holmes was the author of "The Autocrat of the Breakfast Table," which, during the years 1857 and 1858, was published by Phillips, Sampson & Co. of Boston in twelve successive numbers of the Atlantic Monthly, a periodical magazine published by them.

[5] See Childs' Personal Property, § 85.

These twelve parts were published under an agreement between Dr. Holmes and said firm, whereby the author granted them the privilege of publishing the same, the firm stipulating that they should have no other right in or to said book. No copyright was secured either by the author or by the firm or by any other person in any of the twelve numbers so published in the Atlantic Monthly; but on Nov. 2, 1858, after the publication of the last of the twelve numbers, Dr. Holmes deposited a printed copy of the title of the book in the clerk's office of the district court of the district of Massachusetts, wherein the author resided. The book was published by the above firm on Nov. 22, 1858, and on the same day a copy of the book was delivered to the clerk of the district court. The usual notice of entry according to act of congress, etc., by Oliver Wendell Holmes, etc., was printed in every copy of every edition of the work subsequently published. There was a slight variation in the edition published in 1874.

On July 12, 1886, Dr. Holmes recorded the title a second time; sent a printed copy to the Librarian of Congress, who recorded the same, etc., "Copyright, 1886, by Oliver Wendell Holmes."

Since November 1, 1894, defendant has sold and disposed of a limited number of the copies of the book entitled "The Autocrat of the Breakfast Table," all of which were copied by the defendant from the twelve numbers of the Atlantic Monthly exactly as they were originally published, and upon each copy so sold a notice appeared that the same were taken from the said twelve numbers of the Atlantic Monthly.

From a decree for the defendant the complainant appealed.]

MR. JUSTICE BROWN.—This case raises the question whether the serial publication of a book in a monthly magazine, prior to any steps taken towards securing a copyright, is such a publication of the same, within the meaning of the act of February 3, 1831, as to vitiate a copyright of the whole book, obtained subsequently, but prior to the publication of the book as an entirety.

The right of an author, irrespective of statute, to his own productions and to a control of their publication, seems to have been recognized by the common law, but to have been so ill defined that from an early period legislation was adopted to regulate and limit such right. The earliest recognition of this common-law right is to be found in the charter of the Stationers' Company, and certain decrees of the star chamber promulgated in 1556, 1585, 1623, and 1637, providing for licensing and regulating the manner of printing and the number of presses throughout the kingdom, and prohibit-

ing the publication of unlicensed books. Indeed, the star chamber seems to have exercised the power of search, confiscation, and imprisonment without interruption from parliament, up to its abolition, in 1641. From this time the law seems to have been in an unsettled state—although parliament made some efforts to restrain the licentiousness of the press—until the eighth year of Queen Anne, when the first copyright act was passed, giving authors a monopoly in the publication of their works for a period of from 14 to 28 years. Notwithstanding this act, however, the chancery courts continued to hold that, by the common law and independently of legislation, there was a property of unlimited duration in printed books. This principle was affirmed so late as 1769 by the court of king's bench in the very carefully considered case of Millar v. Taylor, 4 Burrows 2303, in which the right of the author of "Thompson's Seasons" to a monopoly of this work was asserted and sustained. But a few years thereafter the house of lords, upon an equal division of the judges, declared that the common-law right had been taken away by the statute of Anne, and that authors were limited in their monopoly by that act. Donaldson v. Becket, Id. 2408. This remains the law of England to the present day. An act similar in its provisions to the statute of Anne was enacted by congress in 1790, and the construction put upon the latter in Donaldson v. Becket was followed by this court in Wheaton v. Peters, 8 Pet. 591. While the propriety of these decisions has been the subject of a good deal of controversy among legal writers, it seems now to be considered the settled law of this country and England that the right of an author to a monopoly of his publications is measured and determined by the copyright act; in other words, that, while a right did exist by common law, it has been superseded by statute.

The right thus secured by the copyright act is not a right to the use of certain words, because they are the common property of the human race, and are as little susceptible of private appropriation as air or sunlight; nor is it the right to ideas alone, since in the absence of means of communicating them they are of value to no one but the author. But the right is to that arrangement of words which the author has selected to express his ideas, or, as Lord Mansfield describes it, "an incorporeal right to print a set of intellectual ideas or modes of thinking, communicated in a set of words or sentences and modes of expression. It is equally detached from the manuscript or any other physical existence whatsoever." 4 Burrows 2396. The nature of this property is

perhaps best defined by Mr. Justice Erle in Jefferys v. Boosey, 4 H. L. Cas. 815, 867: "The subject of property is the order of words in the author's composition, not the words themselves; they being analogous to the elements of matter which are not appropriated unless combined, nor the ideas expressed by those words, they existing in the mind alone, which is not capable of appropriation."

The right of an author to control the publication of his works at the time the title to the "Autocrat" was deposited was governed by the act of February 3, 1831 (4 Stat. 436). * * *

The substance of these enactments is that by section 1 the author is only entitled to a copyright of books not printed and published, and by section 4 that, as a preliminary to the recording of a copyright, he must, before publication, deposit a printed copy of the title of such book, etc.

The argument of the plaintiff in this connection is that the publication of the different chapters of the book in the Atlantic Monthly was not a publication of the copyright book, which was the subject of the statutory privilege; that if Dr. Holmes had copyrighted and published the 12 parts, one after the other, as they were published in the magazine, or separately, there would still have remained to him an inchoate right, having relation to the book as a whole; that his copyright did not cover and include the publication of the 12 parts printed as they were printed in the Atlantic Monthly; and that, while the defendant had a right to make copies of those parts and to sell them separately or collectively, he had no right to combine them into a single volume, since that is the real subject of the copyright. Counsel further insisted that, if the author had deposited the 12 parts of the book, one after the other, as they were composed, he would not have acquired the statutory privilege to which he seeks to give effect; that to secure such copyright it was essential to do three things: (1) Deposit the title, "The Autocrat of the Breakfast Table"; (2) deposit a copy of the book, "The Autocrat of the Breakfast Table"; and (3) comply with the provisions concerning notice; that he could acquire the privilege of copyright only by depositing a copy of the very book for which he was seeking protection; that if the taking of a copyright for each chapter created a privilege which was less than the privilege which would have been acquired by withholding the manuscript until the book was completed, and then taking the copyright, this copyright is valid. His position, briefly, is that no one of the 12 copyrights, if each chapter were copyrighted, nor all of them combined, could be held to be a copyright, in the sense

of the statute, of the book, which is the subject of the copyright in question; and that neither separately nor collectively could they constitute the particular privilege, which is the subject of the copyright of "The Autocrat of the Breakfast Table," as a whole.

We find it unnecessary to determine whether the requirement of section 4 could have been met by a deposit of the book, "The Autocrat of the Breakfast Table," prior to the publication of the first part in the Atlantic Monthly, or whether, for the complete protection of the author, it would be necessary that each part should be separately copyrighted. This would depend largely upon the question whether the three months from the publication, within which the author must deposit a copy of the book with the clerk, would run from the publication of the first or the last number in the Atlantic Monthly.

That there was a publication of the contents of the book in question, and of the entire contents, is beyond dispute. It follows from this that defendant might have republished in another magazine these same numbers as they originally appeared in the Atlantic Monthly. He might also, before the copyright was obtained, have published them together, paged them continuously, and bound them in a volume. Indeed, the learned counsel for the plaintiff admits that the defendant had the right to make copies of these several parts, and to sell them separately or collectively, but insists that he had no right to combine them in a single volume. The distinction between publishing these parts collectively and publishing them in a single volume appears to be somewhat shadowy; but, assuming that he had no such right, it must be because the copyright protected the author, not against the republishing of his intellectual productions or "the order of his words," but against the assembling of such productions in a single volume. The argument leads to the conclusion that the whole is greater than the sum of all the parts—a principle inadmissible in logic as well as in mathematics. If the several parts had been once dedicated to the public, and the monopoly of the author thus abandoned, we do not see how it could be reclaimed by collecting such parts together in the form of a book, unless we are to assume that the copyright act covers the process of aggregation as well as that of intellectual production. The contrary is the fact.

* * * If an author permit his intellectual production to be published either serially or collectively, his right to a copyright is lost as effectually as the right of an inventor to a patent upon an

invention which he deliberately abandons to the public, and this, too, irrespective of his actual intention not to make such abandonment. It is the intellectual production of the author which the copyright protects, and not the particular form which such production ultimately takes; and the word "book," as used in the statute, is not to be understood in its technical sense of a bound volume, but any species of publication which the author selects to embody his literary product. We are quite unable to appreciate the distinction between the publication of a book and the publication of the contents of such book, whether such contents be published piecemeal or en bloc.

* * * There is no fixed time within which an author must apply for a copyright, so that it be "before publication"; and, if the publication of the parts serially be not a publication of the book, a copyright might be obtained after the several parts, whether published separately or collectively, had been in general circulation for years. Surely, this cannot be within the spirit of the act. Under the English copyright act of 1845, provision is made for the publication of works in a series of books or parts, but it has always been held that each part of a periodical is a book within the meaning of the act. Henderson v. Maxwell, 4 Ch. Div. 163; Bradbury v. Sharp [1891], Wkly. Notes 143.

We have not overlooked the inconvenience which our conclusions will cause, if, in order to protect their articles from piracy, authors are compelled to copyright each chapter or installment as it may appear in a periodical; nor the danger and annoyance it may occasion to the library of congress and the Smithsonian Institution, where copyrighted articles are deposited, if they are compelled to receive such articles as they are published in newspapers and magazines; but these are evils which can be easily remedied by an amendment of the law.

The infringement in this case consisted in selling copies of the several parts of "The Autocrat of the Breakfast Table" as they were published in the Atlantic Monthly, and each copy so sold was continuously paged so as to form a single volume. Upon its title page appeared a notice that it was taken from the Atlantic Monthly. There can be no doubt that the defendant had the right to publish the numbers separately as they originally appeared in the Atlantic Monthly (since those numbers were never copyrighted), even if they were paged continuously. When reduced to its last analysis, then, the infringement consists in binding them together in a single

volume. For the reasons above stated, this act is not the legitimate subject of a copyright.

The decree of the court below must therefore be affirmed.[6]

LETTERS.

GRIGSBY et al. v. BRECKENRIDGE.

65 Ky. 480, 92 Am. Dec. 509. 1867.

The facts are stated in the opinion.

ROBERTSON, J.—In its aim, its principles, and its results, this is a novel and intensely interesting litigation.

Alfred Shelby was the first, and Robert J. Breckenridge the last husband of Virginia Hart, who died on the 8th of May, 1859, while she was Breckenridge's wife. She had carefully preserved a large number of friendly and confidential letters, which she had received during her girlhood, widowhood, and wedded life. And, as proved by an answer to interrogatories, made testimony by the Code of Practice, she had, on her death-bed, given and delivered them to Mrs. Grigsby, an only daughter of the first marriage. And, on the 9th of September, 1859, Breckenridge, who, in the meantime, had been appointed administrator of his deceased wife's chattels, brought this suit in equity against the appellants for enjoining the publication of *any* of the said letters, and for compelling the surrender of *all* of them to himself.

His petition, without intimating that the publication would affect the memory of his wife, or in any way subject *him* to loss or annoyance, claims that he is entitled to those letters, either as administrator or surviving husband; and nowhere, as mere author, does he claim the *possession* of the letters written by himself. * * *

The revision of that judgment involves interesting considerations of principle, analogy, and policy.

As the judgment excludes letters received before the last marriage, except those written by the last husband, and includes all letters received during that marriage, the circuit judge did not consider the appellee's authorship the sole test of his right, but must have thought that, either as administrator or husband, he

[6] See Childs' Personal Property, § 86.

was entitled to relief as to all letters received by his wife from others as well as himself while she was his wife. And even on this hypothesis, the judgment is unreasonable and inconsistent; for, if any of her letters passed to him either as administrator or husband, the right so devolved on him only because she had some special property in them as her own; and having the same title to all her letters, whenever and from whomsoever received, he had, as administrator and husband, precisely the same right to all, and therefore to those received from her first husband and other friends before her last marriage. All the letters, including those written by the appellee before and during his intermarriage with Virginia Shelby, are described in his petition as merely friendly and confidential communications containing nothing which could, if published, affect his interest or his character. There is property in even such letters. By sending them, the authors parted with their right to the possession, control, or reclamation of them without her consent, and gave her the exclusive right to read and keep them for their enduring memories and sentiments.

This was *her* property, which might have been peculiarly valuable if estimated by only *affectionis pretium*, often exceeding the cash value. The authors also retained a qualified property in their contents which they alone had the right to publish for their own benefit; and therefore, and also because they reflected their emotions and sentiments, they had the right to enjoin publication by the recipient or any other person. This was the *author's* property to *its full extent.*

These correlative rights of property are now established by abundant authority, fortified by principle and analogy.

The ancient common law recognized the exclusive right of the author of a *literary* manuscript to publish it for his own profit. That venerable code being silent as to private letters, it was long a debatable and controverted question whether the same principle applied to them, and defined this reciprocal right of author and recipient. But, as such a manuscript may possess literary merits worthy of publication, and the author should have the right to decide for himself whether the publication would be useful to the public and profitable to himself, and as the letter, whether literary or not, is a transcript of his own mind, the modern common law, moulded by the power of adaptation and expansion, seems now to be identical with the ancient, and applies the same doctrines to private letters—the same reasons, when sifted and

expanded, apparently applying to each class of manuscripts equally and alike.

A production of the mind is property in every essential sense in which a production of the hands is the producer's property. And consequently in England, the mother of the common law, all her jurists and courts have long recognized the exclusive right of the author to publish his own literary manuscript; and, as it is a reflex of his own mind, and the publication of it may be profitable, the same authorities treat the right to publish as his property to that extent. But, as ordinary letters of friendship, or on business, may not be fit for profitable publication, many jurists and judges, ancient and modern, have denied that their authors, after delivery, have any property in them, and adjudged the entire property to be in the recipient. Nevertheless, the modern common law, as expounded by preponderating authority, seems to recognize the author's right to publish even such letters as *his property* to the extent of that right, which he may protect by injunction against piracy or intrusion. (Cites cases.) * * *

Story, in second volume of the Commentaries, section 948, says: "The only ground upon which jurisdiction has been maintained is a right of property, literary or otherwise, in the writer of the letter." To the same effect are the American cases of Wetmore v. Scovill, 3 Edward's Chy. Rep. 315, and Hoyt v. McKenzie, 2 Barbour's Chy. Rep. 320.

A majority of the American cases even deny the right of the author to enjoin the publication of a private letter on the ground of property. But, as before suggested, we incline to the conclusion that the weight of authority, fortified by analogy, preponderates in favor of the author's special property in the publication, and in his consequential right to publish *if he keep or can procure a copy. But the recipient is not bound to keep the original for his transcription, inspection, or other use. There is no adjudged case or elementary dictum extending the author's right of property beyond this circumscribed and contingent range. And all the cases cited in this case thus limit and define it.*

Publication by the author is circulation before the public eye by printing or multiplied copies in writing. The like publicity by the act of the recipient would be an infringement of the author's exclusive right, which he may prevent by injunction. Publication is the same thing in kind, whether by the author or the recipient, and consequently the recipient may read the letters to a friend or deposit them for safe-keeping without violating the author's right of publication. * * *

Consequently, as the author's right to this kind of publication of a letter is the only property which may be protected by injunction, the recipient may rightfully make any use of the letter which will not, in the same sense, amount to publication, without violating the author's exclusive right or entitling him to enjoin such lawful and consistent use. * * *

It seems to us, therefore, as a necessary consequence of the foregoing principles and authorities, that the appellee's wife, when she was about to die, and could not, by her own custody, preserve her letters any longer, had a right to secure their continued preservation and enjoyment by a gift and delivery of them to her own daughter, to keep and enjoy, and whom she seemed to prefer to her surviving husband as the custodian of a deposit so consecrated by her feelings and long possession and usufruct *with his acquiescence in her asserted right until after her death. And,* by that solemn transfer and sacred trust, she passed all her own right as separate property in perpetuity. Consequently, none of those letters, after that irrevocable alienation, constituted any portion of her intestate estate, which, if they could have been appreciable as assets, could have passed to the appellee as her administrator. * * *

We are therefore of the opinion that, while the appellee was entitled to an injunction against the publication of the letters written by himself to his wife, he was entitled to none to prevent the publication of any of her other letters; and we are of the opinion, also, that he was not entitled to a judgment for a surrender of any of her letters.

Wherefore, the judgment is reversed, and the cause remanded, with instructions to enjoin the publication of the letters of which the appellee was author, and to dismiss the petition as to all else.[7]

[Judge WILLIAMS dissents.]

INFRINGEMENT.

SANBORN MAP & PUBLISHING CO. v. DAKIN PUB. CO. et al.

39 Fed. 266. 1889.

The facts are stated in the opinion.

SAWYER, J. (*orally*).—This is a suit for the infringement of a copyright of a map showing the improvements on property and on

[7] See Childs' Personal Property, §§ 87, 144.

the surrounding property as affecting the risks for the benefit of fire insurance companies, so that they can have the map at hand in their offices, and know the character of their risks, which are noted on the map. This map is copyrighted by the Sanborn Map & Publishing Company. That company sold a copy of its map, or book of maps, I should say (each page covers one or more blocks), to Hutchinson & Mann. Hutchinson & Mann made corrections on it, as the risks changed from time to time, and they procured (the defendant) the Dakin Publishing Company to go over the field, note the changes, and make the corrections on the map. That company made the corrections by putting on pasters, showing the changes made, on the map which Hutchinson & Mann had purchased from the Sanborn Map & Publishing Company, and often by retracing and reproducing portions not changed by pasters. It is claimed that defendants, at the request of Hutchinson & Mann, had a right to do that. The owners certainly had a right to do anything they pleased with the map purchased from complainant so far as making changes and putting on pasters is concerned; but they did more than that. They reproduced portions of the map, sometimes nearly a whole sheet. When the corrections were so many that they found it cheaper and better to make out a sheet than to make corrections on it by pasters in the book, they did so, and then relithographed it, and reproduced the page, multiplying the copies, and often, doubtless, supplying the copies to other companies having complainant's maps or book of maps. While they had a right to put on pasters, cut the map to pieces, and destroy it, they had no right to retrace or reproduce and multiply any material part of the map. In some instances they took whole sheets, made several changes in them, relithographed those sheets so amended, and used them and doubtless furnished them to others to use. If they can do that on one sheet, they can do it on two, three, or four, and finally reproduce the whole book, availing themselves of the plaintiff's works as to all except the changes. If they can reproduce it once, they can do it a dozen times. If they can do it for one man they can do it for every insurance company, and multiply the work indefinitely to the great injury of the owner of the copyright. In my judgment the reproduction, the retracing, or relithographing of any material part of the map is an infringement of the copyright. To the extent of the reproduction of complainant's work, defendants are liable for an infringement, and there must be a decree restraining them from so infringing. There will be a reference to the standing master to

ascertain the profits in pursuance of these suggestions. It is an infringement to retrace or reproduce any material portion of the map. The mere putting on of the pasters and destroying the sheet, without reproducing any part of it, I do not think is an infringement. An accounting will be taken in accordance with that principle.[8]

MOTION PICTURE.

HARPER & BROS. et al v. KALEM CO. et al.

169 Fed. 61. 1909.

The facts are stated in the opinion.

WARD, Circuit Judge.—The late Gen. Lew Wallace wrote a story called "Ben Hur," the copyright of which belongs to the complainants Harper & Bros. The complainants Klaw & Erlanger caused the story to be dramatized, and Harper & Bros. duly copyrighted the dramatization and thereupon granted Klaw & Erlanger the sole right of producing the same upon the stage. The defendant the Kalem Company also employed a writer to read the story, without having any knowledge of the copyrighted drama, and to write a description of certain portions of it. It then produced persons and animals, with their accoutrements, to perform the actions and motions so described. During this performance a film celluloid was rapidly moved across the lens of a high-speed camera, on which a series of negative photographs were taken, from which a positive film suitable for exhibition purposes was reproduced. These positive photographs were contained on one film, about 1,000 feet long, which, being driven at great speed across the lens of an exhibiting machine, projects all the motions of the original actors and animals in succession upon a screen. The defendant advertised this film as suitable for giving public exhibitions of the story of Ben Hur, and sent advertisements to, among other persons, proprietors of theatoriums. At least 500 exhibitions have been given in such theatoriums, an entrance fee being charged. The defendant did not reproduce the whole story, but only certain of the more prominent scenes, such as the wounding of the Roman procurator, Ben Hur in the galleys, the chariot race, and others.

[8] See Childs' Personal Property, § 93.

It does not itself give any public or private exhibitions, but simply sells or licenses the use of the films. A final decree granting a perpetual injunction was entered in the court below, from which this appeal is taken.

Section 4952, Rev. St. U. S. (U. S. Comp. St. 1901, p. 3406), gives the author of a book, and his assigns, not only the sole right of printing, but also the sole right of dramatizing it, and in case of a dramatic composition the sole right of performing or representing it publicly. Section 4964 (page 3413) subjects any one who shall dramatize a copyrighted book without the written consent of the proprietor to the payment of damages. Section 4966 (page 3415) provides that any one who publicly performs or represents a copyrighted dramatic composition without the owner's consent shall be liable for damages not less than $100 for the first and $50 for every subsequent performance, and if his conduct be willful and for profit he shall also on conviction be imprisoned for not exceeding one year.

Two questions are raised: First. Did the defendant, by taking this series of photographs, dramatize Ben Hur, in violation of Harper & Bros.' sole right to dramatize the book under section 4952? Second. Is the exhibition of these photographs by means of an exhibiting machine in theatoriums, where an entrance fee is charged, a public performance or representation of a dramatic composition, in violation of the rights of Harper & Bros., as owners of the copyright of the book and of the dramatic composition, and of the rights of Klaw & Erlanger, as owners of the performing right, under section 4966? There may be several dramatizations of the same story, each capable of being copyrighted. Harper & Bros., having given Klaw & Erlanger the sole right of performing the particular copyrighted drama, can give some one else the sole right of performing a different dramatic composition of the story (Drone on Copyright, p. 597); whereas, Klaw & Erlanger, who are the owners only of the right publicly to perform the particular copyrighted drama, have no right to make another dramatization. Consequently infringing the copyrighted drama is a different thing from infringing the owner's right to dramatize the copyrighted book.

Answering the first question: The series of photographs taken by the defendant constitutes a single picture, capable of copyright as such (Edison v. Lubin, 122 Fed. 240, 58 C. C. A. 604; American Mutoscope Co. v. Edison [C. C.] 137 Fed. 262); and as pictures only represent the artist's idea of what the author has expressed

in words (Parton v. Prang, 3 Cliff 537, Fed. Cas. No. 10,784), they do not infringe a copyrighted book or drama, and should not as a photograph be enjoined. This distinction between infringement of a copyright of a book and of the performing rights is like the distinction in respect to an infringement between perforated music rolls and sheet music discussed in the case of White-Smith Co. v. Apollo Co., 209 U. S. 1, 28 Sup. Ct. 319, 52 L. Ed. 655, where the court said:

"There is no complaint in this case of the public performances of copyrighted music, nor is the question involved whether the manufacturers of such perforated music rolls, when sold for use in public performances, might be held as contributory infringers."

Coming now to the second question: When the film is put on an exhibiting machine, which reproduces the action of the actors and animals, we think it does become a dramatization, and infringes the exclusive right of the owner of the copyrighted book to dramatize it, as well as his right as owner of the copyrighted drama, and of Klaw & Erlanger's right as owners of the performing right publicly to produce it. In other words, the artist's idea of describing by action the story the author has written in words is a dramatization. It is not necessary that there should be both speech and action in dramatic performances, although dialogue and action usually characterizes them. Judge Blatchford said on this point, in Daly v. Palmer, 6 Blatchf. 256, Fed. Cas. No. 3,552:

"To act, in the sense of the statute, is to represent as real, by countenance, voice, or gesture, that which is not real. A character in a play who goes through with a series of events on the stage without speaking—if such be his part of the play—is none the less an actor in it than one who, in addition to motions and gestures, uses his voice. A pantomime is a species of theatrical entertainment, in which the whole action is represented by gesticulation, without the use of words."

And this court, in the case of Daly v. Webster, 56 Fed. 483, 4 C. C. A. 10, said:

"Upon the main point of the case, namely, whether the combination or series of dramatic events (apart from the dialogue) which makes up the particular scene or portion of the play claimed to be infringed is a dramatic composition, and as such entitled to protection under the copyright laws, it is necessary to add but little to the exhaustive opinion of Judge Blatchford, reported in Daly v. Palmer, 6 Blatchf. 256, Fed. Cas. No. 3,552. The same scene in the same play is elaborately discussed by him, and in his

conclusion that it is a dramatic composition we concur. In plays of this class the series of events is the only composition of any importance. * * * Such a composition, though its success is largely dependent upon what is seen, irrespective of the dialogue, is dramatic. It tells a story which is quite as intelligible to the spectator as if it had been presented to him in a written narrative."

It can hardly be doubted that, if the story were acted without dialogue, the performance would be a dramatization of the book; and we think that, if the motions of the actors and animals were reproduced by moving pictures, this would be only another form of dramatization. If the defendant had taken a series of moving pictures of the play as actually performed by Klaw & Erlanger, the exhibition of them would certainly be an infringement of the dramatic composition, because it would tell the story as they tell it, within the decision of Daly v. Palmer and Daly v. Webster, supra.

Finally, the defendant relies upon section 8, article 1, of the Constitution, that Congress shall have the power "to promote the progress of science and useful arts by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries." It is argued from this that, as these moving pictures only express the artist's conception of the author's ideas as expressed in the words of the copyrighted book or dramatic composition, they cannot be said to infringe the author's rights. But the history of the copyright law does not justify so narrow a construction of the word "writings." The first copyright law of 1790 (Act May 31, 1790, c. 15, 1 Stat. 124), included maps and charts as well as books. In 1802 (Act April 29, 1802, c. 36, 2 Stat. 171) copyright was extended to engravings, etchings, and prints. In 1856 (Act Aug. 18, 1856, c. 169, 11 Stat. 138) it was extended in the case of copyrighted dramatic compositions to the right of publicly performing the same. In 1870 (Act July 8, 1870, c. 230, 16 Stat. 212) it was extended to paintings, drawings, chromos, statues, models, designs, photographs, and the negatives thereof, and authors were also allowed to reserve the right to dramatize their works. In 1891 (section 4952, Rev. St. U. S.) authors and their assigns were given the exclusive right to dramatize their copyrighted works. The construction of the word "writings" to cover these various forms of expression, and also to cover the right of giving public performances, has been acquiesced in for over 50 years. In view of this fact, we have no difficulty in concluding that moving pictures would be a form of expression

infringing not the copyrighted book or drama, but infringing the author's exclusive right to dramatize his writings and publicly to perform such dramatization.

Decree affirmed.[9]

4

GOODWILL

HAUGEN et al. v. SUNDSETH et al.

106 Minn. 129, 118 N. W. 666. 1908.

The facts are stated in the opinion.

BROWN, J.—This action was brought to restrain and enjoin defendants from engaging in or conducting a retail furniture and undertaking business in the city of Minneapolis, and for other relief. Plaintiff moved the court for the issuance of a temporary injunction pending the suit, which, after hearing, was granted as to defendant Sundseth, but denied as to defendant Sundseth Furniture & Undertaking Company. Defendant Sundseth appealed.

The facts are as follows: On July 5, 1905, defendant Sundseth was, and for some time prior thereto had been, engaged in conducting the business of a retail dealer in furniture and undertaking in the city of Minneapolis. He had established a large and profitable trade, and was successfully carrying it on. On the day stated, after some negotiations, he sold out his business to Haugen & Meier, a copartnership composed of Thomas Haugen and John Meier, for the consideration in round numbers of $7,000 in money and the execution by Sundseth of the following contract, by which he transferred to his grantees the good will to the business and agreed not to enter into the same in said city for the term of five years thereafter: "This agreement, made this 10th day of July, 1905, by and between Thomas A. Haugen and John Meier, co-partners as Haugen and Meier, parties of the first part, and Andrew Sundseth, party of the second part, witnesseth: 'Whereas the said parties of the first part have taken and purchased from the party of the second part the business and store of said second party in the city of Minneapolis, which said business includes the business of retailing furniture, house furnishings, stoves and ranges; and also general undertaking and embalming business; and also including the good will of said second party, in the said city

[9] See Childs' Personal Property, § 93.

of Minneapolis, in connection with said business; and whereas said first parties wish to protect the interest of said copartnership, in the conduct of said business, now therefore, as a part of the consideration of said purchase and sale, the said second party hereby agrees to and with the first parties that he will not engage in the business of selling or retailing furniture, or house furnishings, stoves and ranges; or in the business of undertaking or embalming, either directly or indirectly, in the city of Minneapolis for a period of five (5) years from the date of this contract; that he will not own or control any stock in any corporation engaged in said business, and will not become interested in any copartnership engaged in said business during a period of said five (5) years, and will not become an employee of any copartnership, corporation or individual engaged in said business at any time during said period of five (5) years; or will not give or lend his influence, either directly or indirectly to the support or promotion of said business.' The term 'said business' shall include the business or businesses herein above described, and all lines of business usually carried on in connection therewith. [Signed] A. Sundseth." The transaction was completed on the 10th of July, 1905, and Haugen & Meier then took possession of the business, and thereafter managed and conducted it until some time in March, 1906, when the firm was dissolved, and the business, including all rights under the contract above set out, sold to the plaintiffs herein, a copartnership composed of Tollef K. Haugen and John Meier, under the firm name of Haugen & Meier Company. Thereafter the defendant Sundseth Furniture & Undertaking Company was organized and opened up a furniture and undertaking business in the neighborhood of the old stand occupied by defendant Sundseth prior to the sale to Haugen & Meier. Plaintiffs allege that this new concern was organized by defendant Sundseth using the name of his wife, and that he has controlled and conducted the same since its organization in his own interest and in violation of the contract under which he sold the good will of the business to Haugen & Meier. After the formation of that corporation, this action was brought by plaintiffs, successors of Haugen & Meier, to restrain both defendant Sundseth and the Sundseth Furniture & Undertaking Company from continuing in said business in violation of the said contract. The application for the temporary injunction was submitted to the trial court upon the pleadings and affidavits which present numerous issues or questions of fact.

Several questions are discussed in the briefs of counsel, only one

of which requires special mention. By the action of the court in granting a temporary injunction against defendant Sundseth, it must be taken that the issues of fact presented by the pleadings and affidavits were resolved in favor of plaintiffs. That conclusion cannot be disturbed on this appeal; the showing made by defendants not being clearly against the view taken by the trial court. * * * So we come directly to the principal question involved, viz., whether defendant's contract and agreement not to enter again into the furniture business for a period of five years was assignable and passed by the dissolution of the firm of Haugen & Meier and the sale and transfer to the new firm. The only change in the copartnership was the retirement of Thomas A Haugen, he having sold his interest to Tollef K.

It is insisted by defendant Sundseth that the rights of Haugen & Meier in and to the good will of this business did not pass to the new copartnership, for the reason that it was personal to the old firm so long as they should continue to conduct the business, and was not assignable by them to other persons. We are unable to concur in this view of the question. The good will of a business is the favor won from the public and the probability that old customers will continue their patronage. It is an advantage and benefit that is acquired by business establishments beyond the value of the money or property invested therein, and is "property" in the legal sense of the term, and subject to sale and transfer in conjunction with a sale of the business, precisely as other personalty. Bradford v. Montgomery, 115 Tenn. 610, 92 S. W. 1104, 9 L. R. A. (N. S.) 979; Williams v. Wilson, 4 Sandf. Ch. (N. Y.) 379; Musselman's Appeal, 62 Pa. 81, 1 Am. Rep. 382; Hitchcock v. Coker, 6 Ad. & El. 438; Pearson v. Pearson, L. R. 27 Ch. Div. 145; 19 Cen. L. J. 362. In the case at bar the good will was sold by Sundseth to the old firm of Haugen & Meier, and if subject to sale as an article of property and as an incident of the business to which it is attached, it is equally assignable by the purchaser, and the new firm acquired a good title. Tuttle v. Howe, 14 Minn. 145 (Gil. 113), 100 Am. Dec. 205. The fact that the contract in question did not run to Haugen & Meier "and their successors and assigns" does not affect the question in the least. While perhaps the use of those words or their equivalent may in instances be essential to confer the right of alienation in the grantee, their use is wholly unnecessary in a case like that at bar. But specific property or substantial property rights which survive to an executor or administrator—in which classification good will,

trade-marks, and trade-names must be included—may be transferred from person to person where an indefeasible title passes from the original owner without reference to the language of the different transfers. In other words, an unconditional sale of specific property to A. passes an indefeasible title and empowers him to sell and transfer to B., whether the original muniment of title ran to A. and his heirs and assigns or not. The rule applies to sales of good will. Fleckenstein Bros. v. Fleckenstein, 66 N. J. Eq. 252, 53 Atl. 1043; Swarts v. Narrangansett Co., 26 R. I. 436, 59 Atl. 111; Salem Mill Co. v. Slayton, etc. (C. C.), 33 Fed. 146; Sheppard v. Stites, 7 N. J. Law 91.

Nor was the good will in the case at bar limited by the contract, properly construed, to the original grantees Haugen & Meier, but, on the contrary, was attached to and an incident to the business transferred and passed to the new firm. Pease v. Rush, 2 Minn. 107 (Gil. 89); Wilmer v. Thomas, 74 Md. 485, 22 Atl. 403, 13 L. R. A. 380, and note. Of course, rights purely personal, which die with the person, cannot be assigned no matter how acquired. But all contracts are to be construed in the light of the rules and principles of law applicable to the subject-matter of the transaction, and the rights and obligations of the parties are controlled by those rules, except where the written contract discloses an intention to depart therefrom. As applicable to the transaction here before us, the good will of the Sundseth business must be taken to have been dealt with by the parties in the light of the principles of law governing rights and interests of this character, and the contract, properly construed, does not justify the conclusion that the parties intended to extend a mere personal privilege to the old firm of Haugen & Meier.

Affirmed.[10]

TRADEMARK—NATURE OF. 5

UNITED STATES v. STEFFENS.

(Two other cases.)

100 U. S. 82, 25 L. Ed. 550. 1879.

The facts are stated in the opinion.

MR. JUSTICE MILLER.—The three cases whose titles stand at the head of this opinion are criminal prosecutions for violations of

[10] See Childs' Personal Property, § 95.

what is known as the trademark legislation of Congress. * * * In all of them the judges of the circuit courts in which they are pending have certified to a difference of opinion on what is substantially the same question, namely: Are the acts of Congress on the subject of trade-marks founded on any rightful authority in the Constitution of the United States?

The entire legislation of Congress in regard to trade-marks is of very recent origin. It is first seen in sections 77 to 84, inclusive, of the Act of July 8, 1870, 16 Stat. at L. 198, entitled "An Act to Revise, Consolidate and Amend the Statutes Relating to Patents and Copyrights." * * *

It is sufficient at present to say that they provide for the registration, in the Patent Office, of any device in the nature of a trade-mark to which any person has, by usage, established an exclusive right, or which the person so registering intends to appropriate by that act to his exclusive use; and they make the wrongful use of a trade-mark, so registered, by any other person, without the owner's permission, a cause of action in a civil suit for damages. Six years later we have the Act of August 14, 1876, 19 Stat. at L., 141, punishing by fine and imprisonment the fraudulent use, sale and counterfeiting of trade-marks registered in pursuance of the statutes of the United States, on which the informations and indictments are founded in the cases before us.

The right to adopt and use a symbol or a device to distinguish the goods or property made or sold by the person whose mark it is, to the exclusion of the use of that symbol by all other persons, has been long recognized by the common law and the chancery courts of England and of this country, and by the statutes of some of the States. It is a property right, for which damages may be recovered in an action at law, and the violation of which will be enjoined by a court of equity, with compensation for past infringement. This property and the exclusive right to its use were not created by the Act of Congress, and do not now depend upon that act for their enforcement. The whole system of trade-mark property and the civil remedies for its protection existed long anterior to the Act of Congress, and remain in full force since its passage

These propositions are so well understood as to need no citation of authorities or elaborate argument to prove them.

The property in trade-marks and the right to their exclusive use resting on the laws of the States in the same manner that other property does, and depending, like the great body of the rights of person and of property, for their security and protection on those

laws, the power of Congress to legislate on the subject, to establish the conditions on which these rights shall depend, the period of their duration, and the legal remedies for their protection, if such power exist at all, must be found in some clause of the Constitution of the United States, the instrument which is the source of all the powers that Congress can lawfully exercise.

The first of these is the eighth clause of section 8 of the first article of the Constitution. * * * "To promote the progress of science and useful arts, by securing for limited times, to authors and inventors, the exclusive right to their respective writings and discoveries."

As the first and only attempt by Congress to regulate the right of trade-marks is to be found in the act to which we have referred, entitled "An Act to Revise, Consolidate and Amend the Statutes Relating to Patents and Copyrights," terms which have long since become technical, as referring, the one to inventions and the other to writings of authors, it is a reasonable inference that this part of the statute also was, in the opinion of Congress, an exercise of the power found in that clause of the Constitution. * * *

Any attempt, however, to identify the essential characteristcs of a trade-mark with inventions and discoveries in the arts and sciences, or with the writings of authors, will show that the effort is surrounded with insurmountable difficulties.

The ordinary trade-mark has no necessary relation to invention or discovery. The trade-mark recognized by the common law is generally the growth of a considerable period of use, rather than a sudden invention. It is often the result of accident rather than design, and when under the act of Congress it is sought to establish it by registration, neither originality, invention, discovery, science or art is in any way essential to the right conferred by that act. If we should endeavor to classify it, under the head of writings of authors, the objections are equally strong. In this, as in regard to inventions, there is required originality. And while the word writings may be liberally construed, as it has been, to include original designs for engravings, prints, etc., it is only such as are original, and are founded in the creative powers of the mind. The writings which are to be protected are the fruits of intellectual labor, embodied in the form of books, prints, engravings and the like. The trade-mark may be and, generally, is, the adoption of something already in existence as the distinctive symbol of the party using it. At common law the exclusive right to it grows out of the use of it, and not its mere adoption. By the act of Congress

his exclusive right attaches upon registration. But in neither case does it depend upon novelty, upon invention, upon discovery, or upon any work of the brain. It requires no fancy or imagination, no genius, no laborious thought. It is simply founded on priority of appropriation. We look in vain in the statute for any other qualification or condition. If the symbol, however plain, simple, old or well known, has been first appropriated by the claimant as his distinctive trade-mark, he may, by registration, secure the right to its exclusive use. * * *

The other clause of the Constitution supposed to supply the requisite authority in Congress is the third of the same section, which, read in connection with the granting clause, is as follows: "The Congress shall have power to regulate commerce with foreign nations, and among the several States, and with the Indian tribes."

The argument is, that the use of a trade-mark—that which alone gives it any value—is to identify a particular class or quality of goods as the manufacture, produce or property of the person who puts them in the general market for sale; that the sale of the article so distinguished is commerce; that the trade-mark is, therefore, a useful and valuable aid or instrument of commerce, and its regulation by virtue of the above provision of the Constitution belongs to Congress, and that the act in question is a lawful exercise of this power.

It is not every species of property which is the subject of commerce, or which is used or even essential in commerce, which is brought by this clause of the Constitution within the control of Congress. * * *

* * * It is a general declaration that anybody in the United States, and anybody in any other country which permits us to do the like, may, by registering a trade-mark, have it fully protected. So, while the person registering is required to furnish "A statement of the class of merchandise, and the particular description of the goods comprised in such class by which the trade-mark has been or is intended to be appropriated," there is no hint that it is goods to be transported from one State to another, or between the United States and foreign countries. Section 4939 is intended to impose some restrictions upon the Commissioner of Patents in the matter of registration, but no limitation is suggested in regard to persons or property engaged in the different classes of commerce mentioned in the Constitution. When we come to the remedies provided by the act for the infringement of the rights of the owner of the registered trade-mark there is no restriction of the right

of action or suit, to a case of trade-mark used in foreign or interstate commerce.

It is, therefore, manifest that no such distinction is found in the act, but that its broad purpose was to establish a universal system of trade-mark registration, for the benefit of all who had already used a trade-mark, or who wished to adopt one in the future, without regard to the character of the trade to which it was to be applied, or the locality of the owner, with the solitary exception that those who resided in foreign countries which extended no such privileges to us were excluded from them here. * * *

While we have, in our references in this opinion to the trade-mark legislation of Congress, had mainly in view the Act of 1870, and the civil remedy which that act provided, it was because the criminal offenses described in the Act of 1876 are, by their express terms, solely referable to frauds, counterfeits, and unlawful use of trade-marks which have been registered under the provisions of the former act. If that act is unconstitutional, so that the registration under it confers no lawful right, then the criminal enactment intended to protect that right falls with it.

The questions in each of these cases being an inquiry whether these statutes can be upheld in whole or in part as valid and constitutional, must be answered in the negative; and it will be so certified to the proper circuit courts.[11]

COMMON LAW.

Territorial Limits.

DERRINGER v. PLATE.

29 Calif. 292. 1865.

[Bill in equity to restrain use of trade-mark. Judgment for defendant and plaintiff appealed.

The plaintiff, Henry Derringer, a resident of Philadelphia, was the inventor of a pistol known as the Derringer pistol. He adopted as a trade-mark the words, "Derringer, Philadel." and had the same stamped on the breech of each and every pistol manu-

[11] See Childs' Personal Property, §§ 96-107.

factured and sold by him. The plaintiff averred that defendant was manufacturing and selling, at San Francisco, a pistol similar to that of the plaintiff, and was stamping thereon the plaintiff's trade-mark.]

RHODES, J.—This is a suit in equity for an injunction to restrain the defendant from pirating the plaintiff's trade-mark, and for the recovery of damages for a violation of the plaintiff's trade-mark property.

The defendant's demurrer to the complaint was sustained, and the only question presented on the appeal is whether the statute of 1863, concerning trade-marks repealed or abrogated the remedies afforded by the common-law in trade-mark cases. The plaintiff does not allege a compliance with the provisions of the statute. He contends that the remedies given by the statute are cumulative to those which a party was entitled to at common law, and the defendant insists that the statute forms a "complete scheme" in respect to trade-marks, and thereby repeals the common-law rules relating to the same subject matter.

Right to a Trade-Mark at Common Law.

Any name, symbol, letter, figure or device adopted by the persons manufacturing or selling goods, and used and put upon such goods to distinguish them from those manufactured or sold by others, and employed so often and for such a length of time, as to raise the presumption that the public would know that it was used to indicate ownership of the goods in the person manufacturing or selling them, constitutes his trade-mark. His right to the trade-mark accrues to him from its adoption and use for the purpose of designating the particular goods he manufactures or sells, and although it has no value except when so employed, and indeed has no separate abstract existence, but is appurtenant to the goods designated, yet the trade-mark is property, and the owner's right of property in it is as complete as that which he possesses in the goods to which he attaches it, and the law protects him in the enjoyment of the one as fully as of the other. In order that the claimant of the trade-mark may primarily acquire the right of property in it, it must have been originally adopted and used by him—that is, the assumed name or designation must not be one that was then in actual use by others (Upton's Trade-Marks 46)—and such adoption and use confer upon him the right of property

in the trade-mark. It was at one time thought that no man could acquire a right to a particular trade-mark (Blanchard v. Hill, 2 Atk. 284), but as the true interests of manufactures and commerce were more fully developed and appreciated, the right of property in trade-marks was recognized, and the doctrine has been uniform for many years, that the manufacturer or merchant does possess an exclusive property in the trade-mark adopted and used by him. The right of property does not in any manner depend for its inceptive existence or support upon statutory law, though its enjoyment may be better secured and guarded, and infringements upon the rights of the proprietor may be more effectually prevented or redressed by the aid of the statute than at common law. Its exercise may be limited or controlled by statute, as in case of other property, but like the title to the good will of a trade, which it in some respects resembles, the right of property in a trade-mark accrues without the aid of the statute. The right is not limited in its enjoyment by territorial bounds, but subject only to such statutory regulations as may be properly made concerning the use and enjoyment of other property, or the evidences of title to the same; the proprietor may assert and maintain his property right wherever the common law affords remedies for wrongs. The manufacturer at Philadelphia who has adopted and uses a trade-mark, has the same right of property in it at New York or San Francisco that he has at his place of manufacture. It was held in Taylor v. Carpenter, 3 Story 450, and the Collins Company v. Brown, 3 Kay & Johns 423, that an alien was entitled to be protected in the ownership of this character of property, equally with the citizen.

Act of 1863 Concerning Trade-Marks.

Does not the Act of 1863, instead of constituting a "complete scheme" for the acquisition and protection of property in trade-marks, rather proceed on the theory that this species of property did exist, and might thereafter be acquired, under the rules of the common law, and provide that those securing such right according to the provisions of the act, might have a further or more efficient protection than those who failed to avail themselves of the statute, and relied upon the common law remedies? * * *

Common Law Remedies for Invasion of Trade-Marks.

At common law, the remedies for invasions of trade-mark property were an action at law for the recovery of damages, and an

injunction, in which case pecuniary compensation might be incidentally awarded. Several of the States have, by statute, added a criminal prosecution as a further remedy or protection. The remedies at common law, are still left by our statutes in those cases where the trade-mark has not been registered according to the act, for not only is the right of property recognized and affirmed as it existed at common law, and the common law remedies are not taken away, but the protection afforded by suits at law and bills for injunctions is expressly conceded. Those provisions add nothing to the rights previously possessed by the owner of the trade-mark, and are only in affirmance of the common law. But he does not have the aid of a criminal prosecution for his protection.

On the other hand, those owning trade-marks, who have filed their claims and affidavits, and paid the fees, have the protection accorded to the other class of cases, and have also that arising from the criminal prosecutions, with penalties, upon conviction, of more than usual severity. * * *

Judgment reversed, and the cause remanded, with directions to the court below to overrule the demurrer.[12]

HANOVER STAR MILLING CO. v. METCALF. (No. 23.)

ALLEN & WHEELER CO. v. HANOVER STAR MILLING CO. (No. 30.)

240 U. S. 403, 36 Sup. Ct. Rep. 357, 60 L. Ed. 713. 1916.

The facts are stated in the opinion.

MR. JUSTICE PITNEY.—These cases were argued together, and may be disposed of in a single opinion.

In No. 23, the Hanover Star Milling Company, an Illinois corporation engaged in the manufacture of flour in that state, filed a bill in equity on March 4, 1912, in the United States district court for the middle district of Alabama, against Metcalf, a citizen of the State of Alabama and a merchant engaged in the business of selling flour at Greenville, Butler county, in that state, to restrain alleged trade-mark infringement and unfair competition. The bill averred that for twenty-seven years last past complainant had been

[12] See Childs' Personal Property, §§ 98, 99, 103, 106.

engaged in the manufacture of a superior and popular grade of flour, sold by it at all times under the name of "Tea Rose" flour, in a wrapping with distinctive markings, including the words "Tea Rose" and a design containing three roses imprinted upon labels attached to sacks and barrels; that this flour had been marketed thus by complainant in the State of Alabama for the preceding twelve years, during which time * * * it had built up a large and lucrative market, with annual sales of more than $175,000 of Tea Rose flour in that state, and had established a valuable reputation for the name "Tea Rose" and the distinctive wrappings in Alabama and other states, particularly Georgia and Florida; that until shortly before the commencement of the suit complainant's Tea Rose flour was the only flour made, sold, or offered for sale under that name in Butler county or elsewhere in the State of Alabama, and the name "Tea Rose" had represented and stood for complainant's flour; and that recently the Steeleville Milling Company, of Steeleville, Illinois, had, through Metcalf's agency, been marketing in Alabama, and particularly in Butler county, flour of its manufacture, in packages and wrappings substantially identical with complainant's and bearing a design containing three roses and the name "Tea Rose" upon the labels, in a manner calculated to deceive and in fact deceptive to purchasers, thereby threatening pecuniary loss to complainant exceeding $3,000 in amount, and destroying the prestige of complainant's "Tea Rose" flour, and damaging its trade therein.

Defendant's answer denied all attempts to deceive purchasers, and further denied complainant's right to the exclusive use of the words "Tea Rose" or the picture of a rose as a trade-mark; averred that long prior to complainant's first use of it, and as early as the year 1872, the name had been adopted, appropriated, and used as a trade-mark for flour by the firm of Allen & Wheeler of Troy, Ohio, and used by it and its successor, the Allen & Wheeler Company, continuously as such; and alleged that the Steeleville Milling Company had used its "Tea Rose" brand for more than sixteen years last past, and as early as the year 1899 had sold flour in Alabama under that label.

Upon consideration of the bill and answer and affidavits submitted by the respective parties, the district court granted a temporary injunction restraining Metcalf from selling flour labeled "Tea Rose," manufactured by the Steeleville Company or any person, firm, or corporation other than the Hanover Company, at Greenville, or at any other place in the middle district of Alabama.

Upon appeal, the circuit court of appeals for the fifth circuit reversed this decree and remanded the cause, with directions to dismiss the bill. 122 C. C. A. 483, 204 Fed. 211. A writ of certiorari was then allowed by this court.

In No. 30, the Allen & Wheeler Company, a corporation of the state of Ohio, manufacturing flour at the city of Troy, in that state, filed a bill against the Hanover Star Milling Company on May 23, 1912, in the United States district court for the eastern district of Illinois, averring that in or before the year 1872 the firm of Allen & Wheeler, then engaged in the manufacture of flour at Troy, adopted as a trade-mark for designating one of its brands the words "Tea Rose," and from thence until the year 1904 continuously used that trade-mark by placing it upon sacks, barrels, and packages containing the brand and quality of flour designated by that term and sold throughout the United States; that in 1904 the Allen & Wheeler Company was incorporated and took over the mills, machinery, stock, trade-mark, and good will of the firm, since which time the corporation had continued to use the trade-mark upon flour of its manufacture, and had distributed and sold such flour in the markets of the United States, whereby the words "Tea Rose" had become the common-law trade-mark of the Allen & Wheeler Company; * * * An injunction and an accounting of profits were prayed. Upon this bill, a demurrer filed by the Hanover Company, and affidavits presented by both parties, the district court granted a temporary injunction restraining the use of the words "Tea Rose" as a trade-mark for flour, without territorial restriction. The circuit court of appeals for the seventh circuit reversed this decree, and remanded the cause to the district court for further proceedings not inconsistent with its opinion. (L. R. A. 1916D, 136) 125 C. C. A. 515, 208 Fed. 513. An appeal was taken to this court, and a writ of certiorari was subsequently granted. The appeal must be dismissed for want of jurisdiction, and the case will be disposed of under the writ of certiorari. * * *

In both cases it was shown without dispute that the firm of Allen & Wheeler adopted and used the words "Tea Rose" as a trade-mark for one kind or quality of flour manufactured by it as early as the year 1872, and continued that use until the year 1904, when the Allen & Wheeler Company was incorporated, and took over the mills, machinery, stock, trade-mark, and good will of the firm and succeeded to its business. But there is nothing to show the extent of such use or the markets reached by it, except that in the

year 1872 Allen & Wheeler sold three lots of 25 barrels each to a firm in Cincinnati, Ohio, and one lot of 100 barrels to a firm in Pittsburgh, Pennsylvania; * * * There is nothing to show that the Allen & Wheeler "Tea Rose" flour has been even advertised in Alabama or the adjoining states, and there is clear and undisputed proof that it has not been sold or offered for sale or known or heard of by the trade in Alabama, Mississippi, or Georgia. In No. 30, there is uncontradicted proof that the Allen & Wheeler Company is selling flour in Alabama and Georgia, but under the brands "Eldean Patent" and "Trojan Special."

In both suits, the Hanover Star Miling Company introduced affidavits fairly showing that shortly after its incorporation in the year 1885 it adopted for one of its brands of flour the name "Tea Rose," and adopted for the package or container, whether sack or barrel, a label bearing the name "Tea Rose" and the design already referred to; and that this trade-mark was adopted and used in good faith without knowledge or notice that the name "Tea Rose" had been adopted or used by the Allen & Wheeler firm, or by anybody else. In 1904 the Hanover Company began and has since prosecuted a vigorous and expensive campaign of advertising its Tea Rose flour, covering the whole of the State of Alabama, and parts of Mississippi, Georgia, and Florida, * * * There is nothing to show any present or former competition in Tea Rose flour between the latter company and the Allen & Wheeler firm or corporation, or that either party has even advertised that brand of flour in territory covered by the activities of the other.

Metcalf's purchases of competing Tea Rose flour, which gave rise to the suit brought by the Hanover Company against him, were made from the Steeleville Milling Company, an Illinois corporation, which appears to have adopted the name and design of a tea rose for flour in the year 1895.

It should be added that, so far as appears, none of the parties here concerned has registered the trade-mark under any act of Congress or under the law of any state. Nor does it appear that in any of the states in question there exists any peculiar local rule, arising from statute or decision. Hence, the cases must be decided according to common-law principles of general application.

Interesting and important questions are raised concerning the territorial extent of trade-mark rights. * * *

It will be convenient to dispose first of No. 30. Here the bill is rested upon alleged trade-mark infringement, pure and simple, and no question of unfair competition is involved. The decision

of the court of appeals for the seventh circuit in favor of the Hanover Company and against the Allen & Wheeler Company was rested upon the ground that although the adoption of the Tea Rose mark by the latter antedated that of the Hanover Company, its only trade, so far as shown, was in territory north of the Ohio river, while the Hanover Company had adopted "Tea Rose" as its mark in perfect good faith, with no knowledge that anybody else was using or had used those words in such a connection, and during many years it had built up and extended its trade in the southeastern territory, comprising Georgia, Florida, Alabama, and Mississippi, so that in the flour trade in that territory the mark "Tea Rose" had come to mean the Hanover Company's flour, and nothing else. The court held in effect that the right to protection in the exclusive use of a trade-mark extends only to those markets where the trader's goods have become known and identified by his use of the mark; and because of the non-occupancy by the Allen & Wheeler Company of the southeastern markets it had no ground for relief in equity. Let us test this by reference to general principles.

The redress that is accorded in trade-mark cases is based upon the party's right to be protected in the good will of a trade or business. The primary and proper function of a trade-mark is to identify the origin or ownership of the article to which it is affixed. Where a party has been in the habit of labeling his goods with a distinctive mark, so that purchasers recognize goods thus marked as being of his production, others are debarred from applying the same mark to goods of the same description, because to do so would in effect represent their goods to be of his production and would tend to deprive him of the profit he might make through the sale of the goods which the purchaser intended to buy. Courts afford redress or relief upon the ground that a party has a valuable interest in the good will of his trade or business, and in the trade-marks adopted to maintain and extend it. The essence of the wrong consists in the sale of the goods of one manufacturer or vendor for those of another. * * *

This essential element is the same in trade-mark cases as in cases of unfair competition unaccompanied with trade-mark infringement. In fact, the common law of trade-marks is but a part of the broader law of unfair competition. * * *

Common-law trade-marks, and the right to their exclusive use, are, of course, to be classed among property rights (Trade-Mark Cases, 100 U. S. 82, 92, 93, 25 L. ed. 550, 551); but only in the

sense that a man's right to the continued enjoyment of his trade reputation and the good will that flows from it, free from unwarranted interference by others, is a property right, for the protection of which a trade-mark is an instrumentality. As was said in the same case (p. 94), the right grows out of use, not mere adoption. In the English courts it often has been said that there is no property whatever in a trade-mark, as such. * * * It is plain that in denying the right of property in a trade-mark it was intended only to deny such property right except as appurtenant to an established business or trade in connection with which the mark is used. * * * Thus, in Ainsworth v. Walmsley, L. R. 1 Eq. 518, 524, Vice Chancellor Sir Wm. Page Wood said: "This court has taken upon itself to protect a man in the use of a certain trade-mark as applied to a particular description of article. He has no property in that mark *per se*, any more than in any other fanciful denomination he may assume for his own private use, otherwise than with reference to his trade. If he does not carry on a trade in iron, but carries on a trade in linen, and stamps a lion on his linen, another person may stamp a lion on iron; but when he has appropriated a mark to a particular species of goods, and caused his goods to circulate with this mark upon them, the court has said that no one shall be at liberty to defraud that man by using that mark, and passing off goods of his manufacture as being the goods of the owner of that mark."

In short, the trade-mark is treated as merely a protection for the good will, and not the subject of property except in connection with an existing business. The same rule prevails generally in this country, and is recognized in the decisions of this court already cited. * * *

Expressions are found in many of the cases to the effect that the exclusive right to the use of a trade-mark is founded on priority of appropriation. Thus, in Delaware & H. Canal Co. v. Clark, 13 Wall 311, 323, 20 L. ed. 581, 583, reference is made to "the first appropriator;" in McLean v. Fleming, 96 U. S. 245, 251, 24 L. ed. 828, 830, to "the person who first adopted the stamp;" in Amoskeag Mfg. Co. v. Trainer, 101 U. S. 51, 53, 25 L. ed. 993, 994, the expression is "any symbol or device, not previously appropriated, which will distinguish," etc. But these expressions are to be understood in their application to the facts of the cases decided. In the ordinary case of parties competing under the same mark in the same market, it is correct to say that prior appropriation settles the question. But where two parties independently are employing

the same mark upon goods of the same class, but in separate markets wholly remote, the one from the other, the question of prior appropriation is legally insignificant; unless, at least, it appear that the second adopter has selected the mark with some design inimical to the interests of the first user, such as to take the benefit of the reputation of his goods, to forestall the extension of his trade, or the like.

Of course, if the symbol or device is already in general use, employed in such a manner that its adoption as an index of source or origin would only produce confusion and mislead the public, it is not susceptible of adoption as a trade-mark. * * *

That property in a trade-mark is not limited in its enjoyment by territorial bounds, but may be asserted and protected wherever the law affords a remedy for wrongs, is true in a limited sense. Into whatever markets the use of a trade-mark has extended, or its meaning has become known, there will the manufacturer or trader whose trade is pirated by an infringing use be entitled to protection and redress. But this is not to say that the proprietor of a trade-mark, good in the markets where it has been employed, can monopolize markets that his trade has never reached, and where the mark signifies not his goods, but those of another. We agree with the court below (L. R. A. 1916 D, 136) 125 C. C. A. 515, 208 Fed. 519, that "since it is the trade, and not the mark, that is to be protected, a trade-mark acknowledges no territorial boundaries of municipalties or states or nations, but extends to every market where the trader's goods have become known and identified by his use of the mark. But the mark, of itself, cannot travel to markets where there is no article to wear the badge and no trader to offer the article." * * *

It results from the general principles thus far discussed that trade-mark rights, like others that rest in user, may be lost by abandonment, nonuser, laches, or acquiescence. Abandonment, in the strict sense, rests upon an intent to abandon; and we have no purpose to qualify the authority of Saxlehner v. Eisner & M. Co., 179 U. S. 19, 31, 45 L. ed. 60, 73, 21 Sup. Ct. Rep. 7, to that effect. * * * Allowing to the Allen & Wheeler firm and corporation the utmost that the proofs disclose in their favor, they have confined their use of the "Tea Rose" trade-mark to a limited territory, leaving the southeastern states untouched. Even if they did not know—and it does not appear that they did know— that the Hanover Company was doing so, they must be held to have taken the risk that some innocent party might, during their forty years

of inactivity, hit upon the same mark and expend money and effort in building up a trade in flour under it. If, during the long period that has elapsed since the last specified sale of Allen & Wheeler "Tea Rose"—this was "in the later '70's"—that flour has been sold in other parts of the United States, excluding the southeastern states, no clearer evidence of abandonment by nonuser of trade-mark rights in the latter field could reasonably be asked for. * * * Under the circumstances that are here presented, to permit the Allen & Wheeler Company to use the mark in Alabama, to the exclusion of the Hanover Company, would take the trade and good will of the latter company—built up at much expense and without notice of the former's rights—and confer it upon the former, to the complete perversion of the proper theory of trade-mark rights. * * *

We come now to No. 23. The court of appeals (122 C. C. A. 483, 204 Fed. 211) denied relief to the Hanover Company against Metcalf under the head of trade-mark infringement, partly upon the ground that Allen & Wheeler were the first appropriators of the mark, and that it had been continuously used by that firm and its successor down to the time of the suit, but principally upon the ground that, irrespective of whether this use was so general or continuous as to exclude other appropriations, the evidence showed a use of the same brand by the Steeleville Company commencing in the year 1895, and carried on in the states of Illinois, Tennessee, Indiana, Arkansas, and Mississippi, with occasional shipments into Alabama,—a use so extensive and continuous as to exclude the claim of the Hanover Company to either first appropriation or exclusive use in any of the territory from which it sought to expel Metcalf; and that "the Steeleville Milling Company's first use and its extensive and continuous use established by the evidence in the territory of its selection gave it the unqualified right to extend unhampered its trade in flour under the Tea Rose brand into any part of the United States, and that, too, without incurring the legal odium of unfair competition." * * *

As we regard the proofs, they do not sustain the view of the circuit court of appeals for the fifth circuit either as to first use or as to extensive, continuous, or exclusive use of the Tea Rose brand by the Steeleville Company, and there is nothing in the history of the use of the brand in the disputed territory to deprive the Hanover Company of its right to be protected at least against unfair competition at the hands of the Steeleville Company or of Metcalf as its representative. * * *

It results that the decree under review in No. 23 should be reversed, and the cause remanded for further proceedings in accordance with this opinion, and that the decree in No. 30 should be affirmed.

Decree in No. 23 reversed.

Appeal in No. 30 dismissed.

Decree in No. 30 affirmed.[13]

STATUTORY.

Use of Geographical Name.

ELGIN NATIONAL WATCH CO. v. ILLINOIS WATCH CASE CO.

179 U. S. 665, 21 Sup. Ct. Rep. 270, 45 L. Ed. 365. 1901.

The facts as stated by the court are in substance as follows:

This was a bill filed in the circuit court of the United States for the northern district of Illinois by the Elgin National Watch Company, a corporation organized under the laws of the state of Illinois, having its principal place of business at Elgin and its office in Chicago in that state, against the Illinois Watch Case Company, also a corporation of Illinois, with its principal place of business at Elgin, and certain other defendants, citizens of Illinois.

The bill alleged:

"That prior to the 11th day of April, A. D. 1868, your orator was engaged in the business of manufacturing watches at Elgin, Illinois, which was then a small town containing no other manufactory of watches or watch cases; that your orator had built up at said town a very large business in the manufacture of watches and watch movements, and that said watches and watch movements so made by your orator, had become known all over the world, and had been largely sold and used, not only in this, but in foreign countries.

" * * * That at and before said 11th day of April, A. D. 1868, your orator had adopted the word 'Elgin' as a trade-mark for its said watches and watch movements; that said trade-mark

[13] See Childs' Personal Property, § 103.

was marked upon the watches and watch movements made by your orator, both upon those which entered into commerce in this country and those which were exported to and sold in foreign countries; that your orator's watches became known all over the world as Elgin watches, and their origin and source, as a product of your orator's manufacture, were distinguished from those of all other watches manufactured in any part of the world by said distinguishing word or trade-mark, 'Elgin;' * * *

" * * * That at the time of its adoption of said trade-mark no other person, firm, or corporation engaged in the manufacture or sale of watches was using the word 'Elgin' as a trade-mark or as a designation to designate its goods from those of other manufacturers, and that your orator had the legal right to appropriate and use the said word as its lawful trade-mark for its watches and watch movements."

It was further averred "that, on the 19th day of July, A. D. 1892, under the act of Congress relating to the registration of trade-marks, your orator caused said trade-mark to be duly registered in the Patent Office of the United States according to law, as by the certificate of said registration, or a copy thereof, duly certified by the Commissioner of Patents, here in court to be produced, will more fully and at large appear."

The bill charged that defendants had infringed the rights of complainant by engraving or otherwise affixing the word "Elgin" to the watch cases made and sold by them; that such watch cases were adapted to receiving watch movements of different construction from those made by complainant; that inferior watch movements were liable to be and often were incased in them. * * *

The prayer was for damages and for an injunction to restrain defendants "from directly or indirectly making or selling any watch case or watch cases marked with your orator's said trade-mark, and from using your orator's said trade-mark in any way upon watches or watch cases or in the defendants' printed advertisements, circulars, labels, or the boxes or packages in which their said watch cases are put or exposed for sale."

A demurrer having been overruled, defendants answered denying the legality of the registration of the alleged trade-mark, and any attempt on their part to deceive the public, or the doing of anything they did not have the legal right to do; and asserting that they had never manufactured or offered for sale watches or watch movements; that they manufactured at Elgin watch cases only; that complainant had never manufactured or sold watch

cases with the word "Elgin" on them; that the business of the two companies was separate and distinct; and that whenever the defendant company had used the word "Elgin" it had usually, if not invariably, been done in connection with some other word, as "Elgin Giant" or "Elgin Commander" or "Elgin Tiger," or some other word in combination with the word "Elgin;" that defendant company had never used the word "Elgin" alone, or separately, as registered by complainant, upon goods exported to foreign nations or used in foreign commerce, but only in domestic commerce, and to inform the public of the place where watch cases of the defendant company were manufactured. * * *

It was further alleged "that the word 'Elgin,' being a geographical name or word indicating the name of a prominent manufacturing city in which any manufacturer of watches, watch movements, or watch cases is at liberty to locate and carry on his business, is not appropriable by any single manufacturing person, firm, or corporation, but is open as of common right to the use of any person, firm, or corporation carrying on business at the city of Elgin." * * *

The circuit court decreed that the use of the word "Elgin," whether alone or in connection with other words, was a violation and infringement of complainant's exclusive rights in the premises, and that an injunction issue restraining the use of the word alone or in connection with other words or devices, upon watches, or watch cases, or packages containing watches or watch cases, going into commerce with foreign nations or with the Indian tribes, in such a way as to be liable to cause purchases or others to mistake said watches or the watch movements incased in said watch cases for watches or watch movements manufactured by complainant. 89 Fed. Rep. 487. The case having been carried to the court of appeals, that court reversed the decree of the circuit court, and remanded the cause, with instructions to dismiss the bill. 35 C. C. A. 237, 94 Fed. Rep. 667.

MR. CHIEF JUSTICE FULLER.—The circuit court of appeals held that the bill must be dismissed for want of jurisdiction. The parties to the suit were all citizens of Illinois, and the court was of opinion that it could not be maintained under the act of March 3, 1881 (21 Stat. at L. 592, chap. 138).

In the Trade-mark Cases, 100 U. S. 82, *sub nom.* United States v. Steffens, 25 L. ed. 550, this court held that the act of July 8, 1870, carried forward in §§ 4937 to 4947 of the Revised Statutes, was

void for want of constitutional authority, inasmuch as it was so framed that its provisions were applicable to that which was subject to the control of Congress. * * *

The act of March 3, 1881, followed. By its 1st section it was provided that "owners of trade-marks used in commerce with foreign nations or with the Indian tribes, provided such owners shall be domiciled in the United States, or located in any foreign country or tribes, which by treaty, convention, or law, afford similar privileges to citizens of the United States, may obtain registration of such trade-marks by complying with" certain specified requirements.

By the 2d section the application prescribed by the 1st "must, in order to create any right whatever in favor of the party filing it, be accompanied by a written declaration" "that such party has at the time a right to the use of the trade-mark sought to be registered, and that no other person, firm, or corporation has the right to such use, either in the identical form or in any such near resemblance thereto as might be calculated to deceive; that such trade-mark is used in commerce with foreign nations or Indian tribes, as above indicated; * * *"

The 3d section provided that "no alleged trade-mark shall be registered unless the same appear to be lawfully used as such by the applicant in foreign commerce or commerce with Indian tribes as before mentioned, or is within the provision of a treaty, convention, or declaration with a foreign power; nor which is merely the name of the applicant; nor which is identical with a registered or known trade-mark owned by another and appropriate to the same class of merchandise; or which so nearly resembles some other person's lawful trade-mark as to be likely to cause confusion or mistake in the mind of the public, or to deceive purchasers."

By the 4th section certificates of registration of trade-marks were to be issued, copies of which and of trade-marks and declarations filed therewith should be evidence "in any suit in which such trade-marks shall be brought in controversy;" and by § 5 it was provided that the certificate of registry should remain in force for thirty years from its date, and might be renewed for a like period. By the 11th section nothing in the act was to be construed "to give cognizance to any court of the United States in an action or suit between citizens of the same state, unless the trade-mark in controversy is used on goods intended to be transported to a foreign country or in lawful commercial intercourse with an Indian tribe." The 7th section was as follows:

"That registration of a trade-mark shall be *prima facie* evidence of ownership." * * *

Thus it is seen that under the act registration is *prima facie* evidence of ownership; that the certificate is evidence in any suit or action in which the registered trade-mark is brought in controversy; that the act practically enables treaty stipulations to be carried out, and affords the basis for judicial redress for infringement in foreign countries, where such redress cannot ordinarily be had without registration, as well as in the courts of the United States, when jurisdiction would not otherwise exist. * * *

Trade-marks are not defined by the act, which assumes their existence and ownership, and provides for a verified declaration by applicants for registration, that they have the exclusive right to the particular trade-mark sought to be registered.

The term has been in use from a very early date, and, generally speaking, means a distinctive mark of authenticity, through which the products of particular manufacturers or the vendible commodities of particular merchants may be distinguished from those of others. It may consist in any symbol or in any form of words, but as its office is to point out distinctively the origin or ownership of the articles to which it is affixed, it follows that no sign or form of words can be appropriated as a valid trade-mark which, from the nature of the fact conveyed by its primary meaning, others may employ with equal truth and with equal right for the same purpose.

And the general rule is thoroughly established, that words that do not in and of themselves indicate anything in the nature of origin, manufacture, or ownership, but are merely descriptive of the place where an article is manufactured or produced, cannot be monopolized as a trade-mark. * * *

The word "Elgin" is and has been for very many years the name of a well-known manufacturing city in Illinois. The factory and business of appellees were located at Elgin and in describing their watch cases as made there it is not denied that they told the literal truth so far as that fact was concerned, and this they were entitled to do according to the general rule. Obviously, to hold that appellant had obtained the exclusive right to use the name "Elgin" would be to disregard the doctrine characterized by Mr. Justice STRONG in Delaware & H. Canal Co. v. Clark, as sound doctrine, "that no one can apply the name of a district of country to a well-known article of commerce, and obtain thereby such an exclusive right to the application as to prevent others inhabiting

the district or dealing in similar articles coming from the district from truthfully using the same designation."

But it is contended that the name "Elgin" had acquired a secondary signification in connection with its use by appellant, and should not, for that reason, be considered or treated as merely a geographical name. It is undoubtedly true that where such a secondary signification has been acquired, its use in that sense will be protected by restraining the use of the word by others in such a way as to amount to a fraud on the public, and on those to whose employment of it the special meaning has become attached.

In other words, the manufacturer of particular goods is entitled to the reputation they have acquired, and the public is entitled to the means of distinguishing between those and other goods; and protection is accorded against unfair dealing, whether there be a technical trade-mark or not. The essence of the wrong consists in the sale of the goods of one manufacturer or vendor for those of another.

If a plaintiff has the absolute right to the use of a particular word or words as a trade-mark, then, if an infringement is shown, the wrongful or fraudulent intent is presumed, and although allowed to be rebutted in exemption of damages, the further violation of the right of property will nevertheless be restrained. But where an alleged trade-mark is not in itself a good trade-mark, yet the use of the word has come to denote the particular manufacturer or vendor, relief against unfair competition or perfidious dealing will be awarded by requiring the use of the word by another to be confined to its primary sense by such limitations as will prevent misapprehension on the question of origin. In the latter class of cases such circumstances must be made out as will show wrongful intent in fact, or justify that inference from the inevitable consequences of the act complained of. * * *

In Singer Mfg. Co. v. June Mfg. Co. the Singer machines were covered by patents, whereby there was given to them a distinctive character and form, which caused them to be known as the Singer machines, as differing from the form and character of machines made by others. The word "Singer" was adopted by the Singer Company as designative of their distinctive style of machines, rather than as solely indicative of the origin of manufacture. That word constituted the generic description of the type and class of machines made by that company, and on the expiration of the patent, the right to make the patented article and to use the generic name necessarily passed to the public. But, nevertheless, this court

held that those who availed themselves of this public dedication to make the machines and use the generic designation did so on condition that the name should be so used as not to deprive others of their rights or to deceive the public. Mr. Justice WHITE, delivering the opinion, said:

"It is obvious that if the name dedicated to the public, either as a consequence of the monopoly or by the voluntary act of the party, has a two-fold significance, one generic and the other pointing to the origin of manufacture, and the name is availed of by another without clearly indicating that the machine upon which the name is marked is made by him, then the right to use the name because of its generic signification would imply a power to destroy any good will which belonged to the original maker. It would import, not only this, but also the unrestrained right to deceive and defraud the public by so using the name as to delude them into believing that the machine made by one person was made by another." * * *

It is to be observed, however, that the question we are considering is not whether this record makes out a case of false representation, or perfidious dealing, or unfair competition, but whether appellant had the exclusive right to use the word "Elgin" as against all the world. Was it a lawfully registered trade-mark? If the absolute right to the word as a trade-mark belonged to appellant, then the circuit court had jurisdiction under the statute to award relief for infringement; but if it were not a lawfully registered trade-mark, then the circuit court of appeals correctly held that jurisdiction could not be maintained.

And since, while the secondary signification attributed to its use of the word might entitle appellant to relief, the fact that, primarily, it simply described the place of manufacture, and that appellees had the right to use it in that sense, though not the right to use it without explanation or qualification, if such use would be an instrument of fraud, we are of opinion that the general rule applied, and that this geographical name could not be employed as a trade-mark, and its exclusive use vested in appellant, and that it was not properly entitled to be registered as such. * * *

The Circuit Court of Appeals was right, and its decree is affirmed.[14]

[14] The term "American Girl" as applied to women's shoes made and sold in the United States is descriptive and not geographical, and hence subject to use as a trademark. Hamilton-Brown Shoe Co. v. Wolf Brothers & Co., 240 U. S. 251, 36 Sup. Ct. Rep. 269, 60 L. Ed. 629.

See Childs' Personal Property, § 100.

TRADENAME.

7

Distinction Between Trademark and Tradename.

N. K. FAIRBANK CO v. LUCKEL, KING & CAKE SOAP CO.

102 Fed. 327. 1900.

The facts are stated in the opinion.

HAWLEY, District Judge—This is a suit in equity. It was instituted to restrain the infringement of the trade-mark or trade-name "Gold Dust," used to designate a washing powder manufactured and sold on the market by appellant. The alleged infringement consists of the use of the name "Gold Drop" to designate a washing powder manufactured and sold by appellee. The circuit court held that appellant was not entitled to the relief prayed for, dismissed its bill, and rendered a decree in favor of respondent (88 Fed. 694), from which the present appeal is taken.

The bill, after alleging complainant's use, appropriation, and right to the trade-mark or trade-name of "Gold Dust" to identify its washing soap or powder since the years 1887, avers that respondent, since the 1st day of July, 1897, with full knowledge of complainant's rights in the premises, "wholly without your orator's consent, intending to injure and defraud your orator, and to divert to itself the business and profits connected with the sale of 'Gold Dust' washing powder which of right belong to your orator, has knowingly and fraudently made use, in connection with the manufacture and sale of a washing or soap powder by said defendant manufactured, of the words or designation 'Gold Drop,' and has caused washing or soap powder by it, the said defendant, manufactured, to be offered and sold as 'Gold Dust' washing powder, and as and for the washing powder of your orator's manufacture, and continues so to do, notwithstanding your orator's protest in the premises, in violation of your orator's rights aforesaid, and contrary to equity, to your orator's great loss and injury actually sustained;" that the acts of the respondent are unlawful, and "tend to cause the washing or soap powder of the defendant, put up aforesaid, to be mistaken for your orator's 'Gold Dust' washing powder, and to be substituted therefor by unscrupulous persons, and because, all and singular, they enable and promote an unfair competition, and a false and fraudulent sale of the defendant's washing powder,

as and for your orator's 'Gold Dust' washing powder, to your orator's great loss and injury," and "constitutes a fraudulent, inequitable, and unfair competition in business, and a trespass upon, and violation of, the good will of your orator's business, connected with the manufacture and sale of its 'Gold Dust' washing powder, against which your orator is equitably entitled to be protected, and which fraudulent, inequitable, and unfair competition and trespass upon your orator's good will it prays may be prevented and restrained according to the course of equity," etc. The answer denies having committed any wrongful, illegal, or fraudulent acts, or any acts, in violation of complainant's rights in the premises, and for a separate answer alleges:

"That on or about July, 1894, defendant began to manufacture a certain washing compound or soap powder, and that on or about said time defendant offered said soap powder for sale in the market, and has continued so to do, without interruption, ever since; that defendant placed upon said package of washing compound aforesaid the name or designation 'Gold Drop,' and wrapped the said package in paper of an entirely different color and character from that of the plaintiff, the general effect of which said wrapper was such that the packages of plaintiff and defendant might easily be distinguished, and in truth the defendant avers that there are no common features whatever between the packages of plaintiff and defendant, but that said packages cannot be mistaken one for another; * * * that said soap powder, the package in which the same was sold, the wrapper thereon, designation 'Gold Drop,' figures, color, and general effect of said package was produced, and said powder sold with said wrapper as aforesaid, without any intention to enter into unfair competition with the plaintiff, or to violate any of the rights of the plaintiff whatever; and the defendant avers that the said name 'Gold Drop' on said package, the color, the lettering, and the general effect of said package, do not in any manner whatever violate any of the rights of the plaintiff, or infringe upon the word or name or designation 'Gold Dust,' nor the package in which said plaintiff puts up its said washing compound or soap powder under the name 'Gold Dust.'"

There is no substantial conflict in the evidence produced at the trial. The questions as to priority of use, and expenditure and popularization of the washing powder under the name of "Gold Dust," by appellant, are undisputed.

* * * The controlling question is whether or not the respondent has "knowingly put into the hands of the retail dealer

the means of deceiving the ultimate purchasers." N. K. Fairbank Co. v. R. W. Bell Mfg. Co., 23 C. C. A. 554, 77 Fed. 869, 878, and authorities there cited; New England Awl & Needle Co. v. Marlboro Awl & Needle Co. (Mass.) 46 N. E. 336; Von Mumm v. Frash (C. C.) 56 Fed. 830, 838. The fact that "Gold Drop" was sold to retail dealers for a less price furnished an incentive and inducement to retail dealers to dispose of "Gold Drop" instead of "Gold Dust," as they thereby gained a greater profit for themselves.

The law is well settled that in suits of this character the intention of the respondent in adopting the style of package, or choosing a name for a similar product, is to a certain extent immaterial. It is not essential to the right of complainant to an injunction to show absolute fraud or willful intent on the part of the respondent. Upon familiar principles, it will be presumed that the respondent contemplated the natural consequences of its own acts. If the acts of respondent in the adoption of the name of "Gold Drop" constituted an infringement of the trade-mark or trade-name of the complainant, and it was put on the market in such a manner as to interfere with the legal rights of complainant, to its loss and injury, it would be entitled to an injunction, irrespective of the question of any testimony as to actual fraud or willful intent. The court must determine the intent from respondent's acts and the results produced thereby. R. Heinisch & Sons v. Boker (C. C.) 86 Fed. 766, 769.

It is claimed that the respondent's packages are to the eye unlike complainant's. Admit it. There are many cases where respondent's packages and labels are to the eye so distinctive and unlike the packages of complainant as not to deceive purchasers exercising ordinary care, who are accustomed to the size of the packages and the general characteristics of the labels. But how about the stranger who knows nothing about the packages or the labels, but has read the advertisement, and remembers the name "Gold Dust"? Is it not fair to assume in a case like this that a decided majority of the purchasers would not ask for a specific size of a package with a certain designated label? Would they not call for the article by name? It must constantly be borne in mind that there are two kinds of trade-marks,—one of peculiar pictures, labels, or symbols; the other in the use of a name. The infringement charged herein is in the adoption by the respondent of both the trade-name and trade-mark. So far as the name "Gold Dust" is concerned, the dissimilarity of the labels, size of packages, and character of sym-

bols can make no essential difference. As was said in Hier v. Abrahams, 82 N. Y. 519, 525:

"The trade-mark consisted in the word simply, and the plaintiffs might have printed it on any form of label they might fancy, without losing the protection of the law. The defendants had no right to adopt it by merely putting it on a label of different fashion from that which the plaintiffs had been in the habit of using."

See, also, Battle v. Finlay (C. C.) 45 Fed. 796; N. K. Fairbank Co. v. Central Lard Co. (C. C.) 64 Fed. 133, 136.

The trade-name differs from the trade-mark in this: that one appeals to the ear more than to the eye. The advertisements of the name were for the purpose of having the intended purchaser ask for "Gold Dust" without his having any knowledge of the character of the label on the package he was to receive, and in this sense the fact that the infringer of the name used different devices and symbols would have no great force. The imitation of the name "Gold Dust," by which the soap or washing powder of complainant was known, would constitute an infringement, because purchasers would be liable to be misled who had no knowledge of the article except the advertised name as being the best soap or washing powder in the market. It is not unusual for a certain specific article advertised extensively, of reputed excellence, to become publicly known and called for by the name which is more readily retained in the memory. This is one of the reasons why respondent selected the name of "Gold Drop,"—"on account of its being short; good for advertising, and easy to remember."

Many precautions were taken by respondent to avoid imitating complainant's label. Is it not peculiarly significant that no efforts whatever were made in this direction with reference to the selection of a name totally dissimilar from that of "Gold Dust"? Why was "Gold Drop" selected? There were plenty of other names that were short and easy to remember. Other manufacturers of washing soap had found no difficulty in this regard; for instance: "Pearline;" "Babbit, 1776," etc. When these facts are considered, is it not reasonably clear that in selecting "Gold Drop," which conveys to the mind so close an imitation of "Gold Dust," there was some intention or design upon the part of respondent to impose "Gold Drop" upon the public as that of "Gold Dust," or, at least, to obtain some advantage or benefit from complainant's advertised trade-name "Gold Dust"? Was not this result accomplished whether so intended or not?

These general views bring us directly to what we conceive to be

the controlling question in this case. In the light of the evidence, and of all the surrounding circumstances presented herein, are the names "Gold Dust" and "Gold Drop" so similar in sound as to deceive the unwary or mislead an unsuspecting customer to accept "Gold Drop" for "Gold Dust"? This is the test that has often been applied in cases of this character.

In Celluloid Mfg. Co. v. Cellonite Mfg. Co. (C. C.) 32 Fed. 94, 97, Mr. Justice Bradley said:

"Similarity, not identity, is the usual recourse when one party seeks to benefit himself by the good name of another. What similarity is sufficient to effect the object has to be determined in each case by its own circumstances. We may say, generally, that a similarity which would be likely to deceive or mislead an ordinary unsuspecting customer is obnoxious to the law."

It may be said that if one stops to reflect upon the names "Gold Dust" and "Gold Drop," and listens to the sound, he will discover that the names are not entirely similar. A layman, as well as a lawyer or a judge, might so decide upon a careful inspection and reading of the names. But in determining that question we must put ourselves in the place of a purchaser of ordinary caution, who asks for a washing powder called "Gold Dust," and from his standpoint determine whether he would be liable to be misled or deceived by the name "Gold Drop." Glen Cove Mfg. Co. v. Ludeling (C. C.) , 22 Fed. 823; N. K. Fairbank Co. v. R. W. Bell Mfg. Co., 23 C. C. A. 554, 77 Fed. 869; Manufacturing Co. v. Simpson, 54 Conn. 527, 545, 9 Atl. 395; Colman v. Crump, 70 N. Y. 573, 578.

The question whether complainant's trade-name of the words "Gold Dust" has been appropriated by respondent's use of the words "Gold Drop," separate and distinct from the use of symbols and devices adopted by complainant, may be said to be a close one. But, after a careful examination of the numerous authorities cited by the respective counsel upon this subject, we are of opinion that it must be answered in the affirmative. It is true that in many of the cases the alleged infringer dressed the words relied upon with such accessories that made it clear that the name used might be mistaken for the complainant's words, and the courts in such cases have usually placed their conclusions upon such grounds. The following cases shed some light upon the similarity of names that have been held to be infringements:

In Glen Cove Mfg. Co. v. Ludeling (C. C.), 22 Fed. 823, 825, the contesting parties were both engaged in the manufacture of

corn flour for food. Complainant adopted and used the word "Maizena"; respondents, "Maizharina." The court held that the defendant's word and picture, as applied by him to the packages of his corn flour, in connection with the similarity of his packages in form, size, color, printing, and other characteristics to the complainant's, were well calculated to lead purchasers to confuse the identity of the products of the respective parties. * * *

The conclusions we have reached upon this point are not in opposition to the views expressed by the court in Coats v. Thread Co., 149 U. S. 562, 565, 13 Sup. Ct. 966, 37 L. Ed. 847; Sterling Remedy Co. v. Eureka Chemical & Mfg. Co. (C. C.), 70 Fed. 704, affirmed upon appeal in 25 C. C. A. 314, 80 Fed. 105, and Proctor & Gamble Co. v. Globe Refining Co., 34 C. C. A. 405, 92 Fed. 357, upon which respondent chiefly relies. These cases were decided on the dissimilarity of the labels used by the respective parties and other clearly-distinguishing features of the signs, symbols, and colors used thereon. The first case related to spool thread of "six cords." The court said:

"The controversy between the two parties * * * is reduced to the single question whether, comparing the two designs upon the main or upper end of the spool, there is such resemblance as to indicate an intent on the part of defendants to put off their thread upon the public as that of the plaintiffs', and thus to trade upon their reputation."

The second case related to certain medicinal tablets for the cure of the tobacco habit. The complainant used the trade-mark "No-To-Bac" and the defendant "Baco-Curo." The court with reference to these names said it was not "seriously claimed that they are the same, or so similar that one could well be mistaken for the other." The third was a soap case. The complainant's trade-mark was impressed upon a wrapper or label used for covering cakes of washing soap known to the trade as "Everyday Soap"; on the wrapper or label of defendant's cakes the words were "Everybody's Soap." The case was disposed of by the distinguishing features of the respective labels. The court said: "The appellant relies not so much upon the infringement of its trade-mark as upon its complaint that the use by the defendant of its label is an unfair competition in trade." That case differs from the case in hand in this: that there the appeal was taken from an order denying a preliminary injunction, and the question to be determined was whether the court below had improvidently exercised its discretion, "and not whether, upon the final hearing, upon full

view of all the facts in the case, this court would, upon the evidence before it, reach the same conclusion as that of the court below." Here we have the whole case before us for a decision upon its merits, and upon the whole case we are of opinion that the court erred in dismissing the bill and refusing to grant an injunction. The decree of the circuit court is reversed, and cause remanded, with directions to enter a decree in favor of appellant in accordance with the views expressed in this opinion.[15]

FINNEY ORCHESTRA v. FINNEY'S FAMOUS ORCHESTRA et al.

161 Mich. 289, 126 N. W. 198, 28 L. R. A. (N. S.) 458. 1910.

The facts are stated in the opinion.

MCALVAY, J.—The parties to this controversy are Michigan corporations. The incorporators of complainant for many years before incorporation acted together in a voluntary association under the same name as incorporated, and claim that defendant, without any right, and intending to injure their corporation in its business, etc., wrongfully adopted the name of "Finney's Famous Orchestra," and have by falsely claiming to be the original Finney's Orchestra greatly injured complainant in its business. Complainant claims the sole right to use the name "Finney's Orchestra," and filed its bill of complaint against defendant, asking that it be perpetually enjoined from using the name "Finney's Orchestra" or the name "Finney" in any way, or representing itself to be the original "Finney's Orchestra." Defendant answered this bill of complaint by answer in the nature of a cross-bill, praying affirmative relief, and the benefit of a demurrer. * * * The issues joined were heard before the Wayne circuit court, in chancery, and a decree granted to complainant. Defendant appeals. The main contention in the case is upon the facts presented.

We agree with the findings and conclusion of the trial judge. The evidence preponderates greatly in favor of complainant, the membership of which includes all but three of the entire number of a voluntary association, known since the year 1899 by the name under which they have now become a legal organization under the

[15] See Childs' Personal Property, §§ 97, 101, 106.

laws of this state. Theodore Finney during his lifetime organized and conducted an orchestra known as "Finney's Orchestra" in the year 1864. This he continued to manage and conduct until his death, April 7, 1899. By his will he gave his music and musical instruments to his friend, Frank Mosby, with the request "to keep up the organization of the Finney Orchestra during his natural life." Mosby proceeded at once to do this with the assistance of his fellow associates. The old members, and such as were considered competent by them to be added from time to time, continued to act together with this common purpose under the name of Finney's Orchestra. * * * Fred S. Stone was elected manager, until the election held in January, 1908, when Mr. Shook was elected to that office by a large majority. Mr. Stone's resignation was accepted January 18, 1908. Two of his brothers also withdrew. * * * Twenty-three remaining members, desiring to become a body corporate known as "Finney's Orchestra," under the law of this state, on January 25, 1908, made, executed, and filed articles of association in the office of the Secretary of State, which after being amended to conform with the statute were finally recorded February 7, 1908. In the meantime ex-Manager Stone and three brothers incorporated as "Finney's Famous Orchestra," on January 27, 1908, and this organization holding itself out as the "Original Finney's Orchestra" has caused the injuries complained of. It will be of no benefit to the profession to review this evidence. Suffice it to say, we find no single contention of defendant sustained. It may be fairly inferred from the record that the only reason for the organization of defendant association was to accomplish exactly what is charged in the bill of complaint. The name of this organization was the property of those who made it valuable, and its use by others "different from those who earned a reputation thereunder would be a fraud upon the public." Messer v. Fadettes, 168 Mass. 140-148, 46 N. E. 407, 37 L. R. A. 721, 60 Am. St. Rep. 371. Such trade-names are protected on the ground of unfair competition. Hopkins, Unfair Trade, §§ 52, 53; Weinstock et al. v. Marks, 109 Cal. 529-537, 42 Pac. 142, 30 L. R. A. 182, 50 Am. St. Rep. 57. In the last case cited the court said: "Although there can be no property right in a trade-name which is not subject to a trade-mark, yet it is a fraud on a person who has established a trade and carried it on under a given name that some other person should assume the same name or the same name with a slight alteration in such a way as to induce persons to deal

with him in the belief that they are dealing with one who has given a reputation to the name; and an injunction will issue to prevent such fraudulent infringement of the trade-name."

The decree of the circuit court is affirmed, with costs.[16]

[16] See Childs' Personal Property, § 101.

CHAPTER VI.

LIMITATIONS ON AND INTERESTS IN PROPERTY

OWNERSHIP.

Expert Witness.

DIXON v. PEOPLE.

168 Ill. 179, 48 N. E. 108, 39 L. R. A. 116. 1897.

The facts are stated in the opinion.

MAGRUDER, J.—At the January term, 1895, of the circuit court of Sangamon county, the case of Olive Purdy against the city of Springfield was on trial. It was a suit for damages for injury caused by a defective sidewalk. The appellant, Dr. J. N. Dixon, was called as an expert witness on the part of the city, and testified that he was a physician and surgeon; that he had practiced as such 21 years, and 19 of them in Springfield; that he was surgeon for five railroads running into said city, and had been surgeon from 2 to 17 years; and that he was a graduate of regular schools of medicine, and had been practicing general surgery for 18 years. (The witness was then asked a hypothetical question concerning the case, which question the witness refused to answer on the ground that he was an expert witness and hence entitled to greater pay than an ordinary witness, whereupon he was found guilty of contempt and fined the sum of $25. The witness appeals.)

The question in this case is whether a physician, who has been subpœnaed and is interrogated as an expert witness only, can be punished as for a contempt for refusing to testify, when no compensation greater than that allowed to an ordinary witness has been paid to him, or promised to him. The question here involved has never been directly decided by this court. * * * Our statute treats all witnesses alike, regardless of their "countenance or calling," whether they be physicians or lawyers or ordinary

citizens, so far as the question of the taxation of their fees as costs is concerned. Witnesses are not entitled to special privileges on account of their rank or employment. * * *

The grounds upon which the right to such extra compensation on the part of expert witnesses has been sustained have generally been three in number. * * *

The second ground upon which the claim for such extra compensation is based is that the skill and accumulated knowledge of the expert are his property, and that a man's property should not be taken without just compensation. Various definitions have been given of property. Webster defines property to be "the exclusive right of possessing, enjoying, and disposing of a thing." This court has adopted this definition in Chicago & W. I. R. Co. v. Englewood Conn. Ry. Co., 115 Ill. 375, 4 N. E. 246. Blackstone says, "Property consists in the free use, enjoyment, and disposal of one's acquisitions, without any control or diminution, save only by the laws of the land." 1 Bl. Comm. 138. It has also been said that property, in its legal sense, is not the thing itself, but certain rights in and over the thing, those rights being (1) user; (2) exclusion; (3) disposition. Lewis, Em. Dom. § 54. This court has also said, in discussing the right to make and enforce contracts as being included in the right to acquire property, that labor is property, and that the laborer has the same right to sell his labor, and to contract with reference thereto, as has any other property owner. Ritchie v. People, 155 Ill. 98, 40 N. E. 454. Labor is defined by Webster to be "physical toil or bodily exertion," and also to be "hard muscular effort directed to some useful end, as agriculture, manufactures and the like." He also defines labor to be "intellectual exertion; mental effort, as the labor compiling a history." It is not exactly accurate to say that the mere abstract knowledge acquired in the study of a special employment is of itself property. It is the right to apply that knowledge to the accomplishment of a particular result which constitutes property. For instance, if the appellant had been required to answer a question put to him with a view of prescribing a remedy for the relief of Mrs. Purdy, the plaintiff in the suit in which he was called to testify as a witness, then it might be said, if he was not offered any compensation, that he was deprived of a property right. But where a physician is asked a hypothetical question, and is called upon to give his opinion upon the facts stated in the hypothetical question while he is testifying as a witness in court, he is not thereby required to practice his healing art. He is merely making a state-

ment for the purpose of enabling the court and the jury to understand correctly a case which is before the court. There is no infringement here of a property right. It may be conceded that in a certain sense the knowledge of the physician, acquired by special study, is property; but the question here is, not so much whether certain knowledge is property, as whether the requirement that he shall answer a hypothetical question is a taking of his property. Where he is required to make an application of his knowledge to a particular case, so as to secure a particular result,—such as, for instance, the curing of a disease or the healing of a wound,—then he would undoubtedly be entitled to compensation. A physician or surgeon cannot be punished for a contempt for refusing to make a post mortem examination unless paid therefor; nor can he be required to prepare himself in advance for testifying in court, by making an examination, or performing an operation, or resorting to a certain amount of study, without being paid therefor. But when he is required to answer a hypothetical question, which involves a special knowledge peculiar to his calling, he is merely required to do what every good citizen is required to do in behalf of public peace and public order, and in promotion of public good. Counsel for appellant states that many of the cases which have held that expert witnesses can be required to testify without being paid are criminal cases, where the interest of the state and the interest of the public demand of the physician that he should yield up something of his knowledge for the benefit of society at large. This position, however, is inconsistent with the contention that when an expert witness is required to testify without compensation his property right is interfered with. * * * Upon this subject, Mr. Rogers, in his able and exhaustive work on Expert Testimony (2d Ed., p. 424, § 188), says: "There can be no doubt that professional men are not entitled, in this country, to claim any additional compensation when testifying as ordinary witnesses to facts which happened to fall under their observation. But another question arises when they are summoned to testify as to facts of science with which they have become familiar by means of special study or investigation, or to express opinions, based upon the skill acquired from special researches, as to conclusions which ought to be drawn from certain given facts. Whether they can be compelled to testify in such cases when no other compensation has been tendered than the usual fees of ordinary witnesses testifying to ordinary facts is a point upon which the cases are not in harmony. In this country the cases are nearly

balanced, and the question must be regarded as still an open one, although the weight of authority rather inclines to the theory that the expert may be required to answer the question without additional compensation." As has already been stated, we prefer to adopt the views announced by the supreme court of Alabama, and in the cases following the Alabama decision. * * * For the reasons above stated, we have arrived at the conclusion that the judgments below were correct. Accordingly the judgments of the appellate court and of the circuit court are affirmed. *Affirmed.*[1]

POTENTIAL EXISTENCE.

DICKEY v. WALDO.

97 Mich. 255, 56 N. W. 608, 23 L. R. A. 449. 1893.

[This was an action by the plaintiffs, John W. Dickey and George W. Waldo, against the defendant for the conversion of peaches. Judgment for plaintiffs and defendant appealed.

The facts, as stated in the contract between the parties and the findings of the lower court are substantially as follows:]

Contract: "Articles of agreement, made this 21st day of February, A. D. 1885, between John Schultz, of the township of Saugatuck, Allegan county, Michigan, of the first part, and John W. Dickey and Addison Lurvey, of Douglas, county, and state aforesaid, of the second part, witnesseth as follows: The said party of the first part is the owner of the west half of the east half of the southwest quarter of section twenty-five, township of Saugatuck, aforesaid, and desiring to set out to peach trees a piece just east of his house, and running back to his east line, and far enough south as the piece is suitable for peach trees, but not to exceed 1,500 trees, said first party agrees to set out the trees, and care for and cultivate the same, in a good and workmanlike manner, for the period of ten years from the date hereof, and to allow said Dickey and Lurvey, parties of the second part, to have and take one-half of the crop of peaches for any two years they may select during the aforesaid term of ten years. Said Schultz agrees that, if it shall come to his knowledge that any of the said trees are

[1] See Childs' Personal Property, § 109.

affected with the yellows, that he will immediately dig up and burn the same, root and branch. Said Dickey and Lurvey, parties of the second part, hereby agree, in consideration of the agreements hereinbefore stated, to be performed upon the part of the said Schultz, to furnish what trees may be needed to set the aforesaid piece of land, not to exceed 1,500 trees, and take as pay therefor one-half of the crop of peaches for any two years they may select. It is mutually agreed that said Dickey and Lurvey shall make their selection of the year when they will take the half of the crop on or before September 15th of that year. Each party hereto are to pick and care for their own share of the fruit and are to each take as near half of the crop as may be; but at the close of the season each shall show up their total shipments for the season, and, if it be found one party has taken more than the other, the net proceeds of such surplus shall be equally divided between the parties hereto. Said Schultz agrees to draw that half of the fruit belonging to said Dickey and Lurvey to the boat landing in Douglas, or railroad depot at Fennville, as they may direct. This agreement to be binding upon the legal representatives of the parties hereto. Said second party agrees to furnish a man to help set out the trees. Witness our hands and seals. John W. Dickey. [L. S.] John Schultz. [L. S.] A. Lurvey. [L. S.] In presence of Mary Belle Spencer, Dyer C. Putnam. * * *

"Counsel for the respective parties above named having requested the court to make and file in said cause a finding of the facts, and conclusions of law therefrom, the court, in compliance with such request, finds the facts in said cause, as proved on the trial thereof, to be as follows: (1) That on the 21st day of February, A. D. 1885, John Schultz was the owner and in possession of the west half of the east half of the southwest quarter of section twenty-five, in the township of Saugatuck, in said Allegan county, and state aforesaid. * * * (3) That, at the time said contract was entered into, said parcel of land described in said contract was the homestead of said John Schultz and Deborah Schultz, his wife. (4) That the plaintiffs, in the spring of 1885, furnished the peach trees required in and by the terms of said contract, and set them on the land described in said contract, and in all things performed the agreements by them to be performed, according to the terms of said contract. (5) That on or about the 23d day of April, A. D. 1887, the said John Schultz and wife conveyed the premises described in said contract to the defendant by warranty deed, with covenants of title, and against incumbrances. (6) That, before

and at the time of the execution and delivery of said deed by said John Schultz and wife to said defendant, he, the said defendant, had actual notice and knowledge of the existence and terms of said contract between said Schultz and said plaintiffs, and that, before and at the time of the execution and delivery of said deed, it was agreed between said Schultz and said defendant that said defendant should pay said Schultz $1,850 for said land, instead of $2,000, the full purchase price thereof, and that, as part of the consideration for the sale of said land, said defendant should settle with said plaintiffs for their interest in the peach trees on said land; * * * (7) That the plaintiffs duly selected the year 1891 as one of the years when they would take one-half of the crop, according to the terms of said contract; that said defendant was orally informed by said plaintiffs of such selection July 4, 1891, and that on or about August 22, 1891, the said plaintiffs gave said defendant written notice of such selection, and afterwards, and on or about the 26th day of August, 1891, offered and attempted to pick their share of the fruit, but defendant refused to permit them to do so, and denied that they had any share of the fruit; and that defendant took and converted to his own use the entire crop of fruit grown on said trees during that year. (8) That the value of the peaches grown during the year 1891 on the trees set by said plaintiffs on said land, under said contract, amounted to the sum of $1,541.07 at the time of the conversion of the same by said defendant to his own use. * * * From the foregoing facts, I find the following conclusions of law: (1) The plaintiffs are entitled to maintain this action, and the contract offered in evidence between said Schultz and said plaintiffs was admissible in evidence. (2) Said contract did not convey to the plaintiffs any interest in the land described in said contract, except the right to said plaintiffs to take therefrom one-half of the crop of peaches for any two years they might select during the period of ten years from the date of said contract. (3) The homestead right of John Schultz and wife was in no way affected by said contract, and the question of the homestead right of said Schultz and wife cannot be raised by said defendant in this action. * * * (5) The contract relation between Schultz and plaintiffs was not technically a sale of the peaches thereafter to be grown on said trees by said Schultz to plaintiffs, but was more in the nature of a sale of the trees by plaintiffs to Schultz; plaintiffs reserving, in writing, one-half of the products of said trees for any two years they might select during the period of ten years. (6) The defendant, having notice

of said contract before his purchase of said land, and having agreed, for a valuable consideration, to recognize the rights of plaintiffs under said contract, cannot now claim that said contract was void, or that it was not binding upon him. (7) The defendant and plaintiffs were the owners in common of the crop of peaches grown on said trees during the season of 1891, and the defendant having refused to allow plaintiffs to pick their share of said crop, and denied that plaintiffs had any right to any part of said crop, plaintiffs were entitled to their action of trover without and before any accounting as to the amount of said crop, or the share of each of the others therein. (8) Plaintiffs are entitled to recover in this action, and a judgment should be rendered in their favor, and against said defendant, for the said sum of $770.53, with interest on the same from October 15, 1891,—$23.12,—making a total of $793.65 with costs of suit to be taxed. Geo. M Buck, Circuit Judge. April 15th, 1892."

GRANT, J.—The contract and the finding of facts in this case are found in the margin. This contract and the judgment should be sustained, unless there are some inexorable rules of law which stand in the way. Two rules are invoked to defeat the plaintiffs' action: (1) That the land upon which the peach trees were planted is a homestead; that Schultz's wife did not sign the contract; that it interferes with the homestead right, and the contract is therefore void. (2) That the crop which the plaintiffs agreed to take in payment for the trees was not in esse at the time, and therefore not the subject of sale.

1. We think there is no force in the first proposition. * * *

2. Such contracts are reasonable, and beneficial to both the vendor and the vendee. They are especially beneficial to the vendee. He avoids all expense except his labor, runs no risk, and, if in indigent circumstances, he may obtain gains which would otherwise be beyond his reach. Such contracts are of common occurrence, and, if the rigid rules of law are against their validity, there is a necessity of legislative action to render them valid. The rule of law is well established that things having no potential existence cannot be the subject of mortgage and sale. There are, however, exceptions to this rule, as where a merchant mortgages his stock of goods, and all future additions thereto. It is unnecessary to cite authorities to this proposition. The difficulty seems to arise in determining what comes within the definition of the term "potential existence." The definition of the word "potential" is: "Having latent power; endowed with energy adequate to a

result; efficacious; existing in possibility, not in act." Sir W. Hamilton said: "Potential existence means merely that the thing may be at some time; actual existence, that it now is." In the legal sense, things are said to have a potential existence when they are the natural product or expected increase of something already belonging to the vendor. When one possesses a thing from which a certain product, in the very nature of things, may be expected, such product, we think, has a potential existence. The following rule appears to be well established both by reason and authority, viz.: That, while one owns property from which such product naturally arises, such product may be the subject of sale and mortgage. The authorities which thus hold also recognize the other rule above stated. The authorities are by no means uniform, but we think the conflict in them has arisen from a failure to make a proper distinction. In Grantham v. Hawley, Hob. 132, it was held that a grant of that which the grantor has potentially, though not actually, is good, as a grant by the lessee of all the corn that shall be growing on the land at the end of the term. It was there said: "Though the lessor had it [the corn] not actually in him, nor certain, yet he had it potentially, for the land is the mother and root of all fruits. Therefore, he that hath it may grant all fruits that may arise upon it after, and the property shall pass as soon as the fruits are extant. A person may grant all the tithe wool that he shall have in such a year, yet perhaps he shall have none; but a man cannot grant all the wool that shall grow upon his sheep that he shall buy hereafter, for there he hath it neither actually nor potentially." Powell, in his Treatise on Contracts, says: "Although it be uncertain whether the thing granted will ever exist, and it consequently cannot be actually in the grantor, or certain, yet it is in him potentially, as being a thing accessory to something which he actually has in him, for such potential property may be the subject of a contract executed, as a grant, or the like. * * * So a tenant for life may sell the profits of his lands for three or four years to come, and yet the profits are not then in esse." It is held that a lease of land, reserving rent, and which provides that all the crops raised on the land during the term are to be the property of the lessor until the rent is paid, is valid, and will entitle the lessor to hold such crops against the creditors of the lessee. Smith v. Atkins, 18 Vt. 461. Justice Redfield, in delivering the opinion, said: "It is, without doubt, true that the sale of a thing not in existence is, upon general principles, inoperative, being merely executory; that is, it confers no title in the thing

bargained. But when the thing thereafter to be produced is the produce of land, or other thing, the owner of the principal thing may retain the general property of the thing produced, unless there be fraud in the contract, and it be entered into merely to defeat creditors." In Jones v. Webster, 48 Ala. 112, it is said: "If the mortgagors had undertaken to convey the future crops they might make, without possessing any land upon which to make them, and especially without the contemplation of the immediate acquisition of some, then, certainly, their conveyance would be without operation. In this case they had the land, and the crops conveyed were to be grown upon it during their possessory interests. The crops were an accretion or addition to the land which might very reasonably be expected to be made. They were therefore proper subjects of mortgage." In McCaffrey v. Woodin, 65 N. Y. 464, it is said: "It is well settled that a grant of the future produce of land actually in possession of the grantor at the time of the grant passes an interest in such future crop as soon as it comes into existence." It was held in Andrew v. Newcomb, 32 N. Y. 417,—Chief Justice Denio rendering the opinion,—that crops to be raised by the owner of the land are an exception to the general rule that the "title to property not in existence cannot be affected so as to vest the title when it comes into existence," and that "the owner of land may lawfully contract for its cultivation, and may provide in whom the ownership of the product shall vest." In Watkins v. Wyatt, 9 Baxt. 250, Wyatt agreed to furnish one McCain with supplies on condition that McCain, who was a farmer, should execute to him a mortgage of his cotton crop for the then current year as security for the supplies so furnished "to enable him (McCain) to make said crop." The crop was not then sown. This case cites many of the above authorities, and others. It recognizes that there is a seeming conflict in the adjudged cases upon the subject, but sustains the validity of the mortgage. It is there said: "The right in the proprietor of the soil to plant, cultivate, and gather his crops, to the exclusion of all others, in an absolute legal right, and an incorporeal property, and incorporeal property is as well the subject of valid sale and mortgage as any other kind of property. The mortgagor, in this case, was the proprietor of the land on which he proposed to raise the crop in controversy. The crop had a potential existence, because it was to be the natural product and expected increase of the land then owned and occupied by him." The like contract was sustained in Butt v. Ellett, 19 Wall. 544. This doctrine is also sustained by the following authori-

ties: Arques v. Wasson, 51 Cal. 620; Conderman v. Smith, 41 Barb. 404; Van Hoozer v. Cory, 34 Barb. 10; Senter v. Mitchell, 16 Fed. Rep. 206. In Robbins v. McKnight, 5 N. J. Eq. 642, the contract was in all essential features identical with the one here involved, and it was sustained by the court. In the present case the trees were in existence at the time of the contract, were transferred to and became the property of Schultz, the vendee, subject to a share of the crops for the years specified; the contract was executed by the plaintiffs, and operated to the great benefit of Schultz and his grantee, the defendant. This contract is one that the law ought to delight in sustaining. If it cannot be sustained, then no executed contract can be, where a party furnishes seed, and puts in the crop upon shares. The same reason that would defeat the right to recovery for the crop of peaches in this case would defeat the right to recover a crop of corn, wheat, or other grain, or strawberries and other fruits of like character. The defendant purchased with notice, and the purchase price was reduced on account of the plaintiffs' rights in the crop. We think that under the authorities above cited, as well as in reason and justice, plaintiffs and Schultz became tenants in common of the peaches for the years which they should select, and that defendant, having purchased with notice, stood in the same relation to plaintiffs that did his grantor. Defendant's counsel site Bates v. Smith, 83 Mich. 347, 47 N. W. Rep. 249, and insist that it controls this case in their favor. The language of that case is broad, and, if strictly followed, would seem to include the present one; but we think the authorities above cited make a clear distinction between the natural products of the soil, wool from sheep, milk from cows, and the like, from the case that was then under consideration, and we are disposed to follow them. The language of that case must be construed in connection with its facts. Judgment affirmed. The other justices concurred.[2]

2

ROCHESTER DISTILLING CO. v. RASEY.

142 N. Y. 570, 37 N. E. 632. 1894.

[This was an action of replevin brought by the Rochester Distilling Company against the defendant Rasey to recover possession

[2] See Childs' Personal Property, § 110.

of a growing crop sold to the defendant under a chattel mortgage. The chattel mortgage covered "the grass now growing upon the premises leased," etc.; "also all the corn, potatoes, oats, and beans which are now sown or planted, or which are hereafter sown or planted during the next year." At the time the chattel mortgage was given, all the beans and the greater part of the potatoes were yet to be planted. Judgment for plaintiff and defendant appealed.]

GRAY, J.—I think this case does not, in principle, differ from any other case where a chattel mortgage has been given upon property in expectancy, and which has no potential existence at the time of its execution. The fact that the subject of the mortgage is a crop to be planted and raised in the future upon land does not affect the determination of this question upon established principles. It may be that precisely such a case, in its facts, has not been passed upon in this court; but there are expressions of opinion in several cases of a kindred nature in the Reports of this court and of other courts in this state which leave us in no doubt as to the doctrine which should govern. The proposition that a mortgage upon chattels having no actual or potential existence can operate to charge them with a lien when they come into existence, as against an attaching or an execution creditor, has frequently been discountenanced and repudiated. Grantham v. Hawley, Hob. 132, is the general source of authority for the proposition that one may grant what he has only potentially, and there is no good reason for doubting that that which has a potential or possible existence, like the spontaneous product of the earth or the increase of that which is in existence, may properly be the subject of sale or of mortgage. The right to it when it comes into existence is regarded as a present vested right. That which is, however, the annual product of labor and of the cultivation of the earth cannot be said to have either an actual or a potential existence before a planting. This action being one at law, the inquiry is limited to ascertaining the strictly legal rights of two contending creditors to the property of their debtor, Powell, in the crops which he had raised. It is unlike some of the cases which have arisen between the lessor of land and his lessee. In such a case, a different principle might operate to create and support the lien of the landlord upon the crops as they come into existence upon the land. The title to the land being in him, an agreement between him and the lessee for a lien upon the crops to be raised to secure the payment of the rent would operate and be given legal effect

as a reservation at the time of the title to the product of the land. That was the case of Andrew v. Newcomb, 32 N. Y. 417, where the owner of land agreed with another that he might cultivate it at a certain rent, the crop to remain the property of the landlord until the tenant should give him security for the rent. Judge Denio repudiated the idea that the arrangement could be called a conditional sale of the flax, because the subject was not in existence. He held that the idea of a pledge or of a sale had no application, and that the effect of the contract was to give to the landlord the original title to the crop. His remarks upon the subsequent vesting of the title to crops, when they come into being, have reference to such an arrangement between landlord and tennant, and not to the case of a mortgage or conditional sale to some third person of crops yet to be planted. Mr. Thomas, in his work on Chattel Mortgages, upon the subject of mortgaging a crop not yet planted, says (section 149): "The weight of authority inclines to the view that the lien is an equitable one, and differs in some respects from the charge created by a mortgage of property in existence at the date of the agreement." And, again, he says: "The authorities are mainly to the effect that such a mortgage conveys no title or interest as against attaching or judgment creditors of the mortgagor." About this question of mortgaging personal property to be subsequently acquired much has been written in the books which I deem unnecessary to resume here at any great length. It results from a review of the authorities that a mortgage cannot be given future effect as a lien upon personal property which, at the time of its delivery, was not in existence, actually or potentially, when the rights of creditors have intervened. At law such a mortgage must be conceded to be void. The mortgage could have no positive operation to transfer in praesenti property not in esse. At furthest, it might operate by way of a present contract between the parties that the creditor should have a lien upon the property to be subsequently acquired by his debtor which equity would enforce as against the latter.

In Bank v. Crary, 1 Barb. 542, Paige, J., observed: "I strongly incline to the opinion that a chattel mortgage can only operate on property in actual existence at the time of its execution; that it cannot be given on the future products of real estate; and that, if given one day or one week before the product of the land comes into existence, it is as inoperative as if the chattel mortagage had been given on a crop of grass or grain one, two, or three years previous to its production." In a subsequent case, the same learned

judge considered the nature of a mortgage relating to property not then in existence, and its effect as to creditors of the mortgagor. In Otis v. Sill, 8 Barb. 102, the plaintiff claimed under a chattel mortgage, which, after describing the property mortgaged, contained the following clause: "All scythes manufactured out of the said iron and steel, and all scythes, iron, steel, and coal which may be purchased in lieu of the property aforesaid." Subsequently, the property was taken under execution issued on judgments, and the action was brought for its taking and detention. Paige, J., refers to his opinion in Bank v. Crary, that a chattel mortgage could only operate on property in actual existence at the time of its execution. He elaborately discusses the question of whether such a mortgage was a lien upon the property when acquired, as against the creditors of the mortgagor, and reviews very many authorities in England and some in this country. His conclusions were adverse to the proposition. He held that, as to subsequently acquired property, the mortgage could only be regarded as a mere contract to give a further mortgage upon such property, and that no specific lien was created thereby. He says: "I have come to the conclusion, as the result of all the authorities, that if the mortgage in this case did amount to a contract to execute a further mortgage on subsequently acquired property, it was good as an executory contract only, and did not constitute a lien on the articles of the kind mentioned therein when subsequently purchased." In Gardner v. McEwen, 19 N. Y. 123, the chattel mortgage to the plaintiff upon property in the store, "or which might thereafter be purchased and put into store," was held inoperative to convey the title to the after-acquired property, as against the defendant, who purchased it at a sale under execution upon a judgment against the mortgagor. McCaffrey v. Woodin, 65 N. Y. 459, was an action in trover. Plaintiff was lessee and defendant was agent for the lessor. The former covenanted in the lease that the latter should have "a lien, as security for the payment of the rent," on all the personal property, etc., which should be put upon the premises, "and such lien to be enforced, on the nonpayment of the rent, by the taking and the sale of such property in the same manner as in cases of chattel mortgages on default thereof." By virtue of this provision in the lease, the defendant took the farm produce. The decision upheld the rights of the landlord to do so, holding that as the crops came into existence they vested in the landlord. It is to be noted that the court considered the case as one to be governed by equitable principles, observing that "the matter

comes up solely between the parties, there being no intervening rights of creditors." Referring to Gardner v. McEwen, supra, it was remarked that that "is a case between the mortgagee and creditors, and was affected by our act concerning filing chattel mortgages." Treating the question as one for the application of equitable principles, it was held that the lessor was entitled to set up her equitable rights as a defense to the plaintiff's (the lessee's) action of trover. * * * In Cressey v. Sabre, 17 Hun. 120, where the opinion was delivered by Boardman, J., and was concurred in by Learned and Bockes, JJ., a chattel mortgage upon potatoes (among other articles of property) which were not yet planted, was held inoperative. The distinction was there mentioned between a case like McCaffrey v. Woodin, where the question of title was between the parties to the contract and one where it arose between the mortgagee and a third person. In Coats v. Donnell, 94 N. Y. 168, Andrews, J., observed that "a contract for a lien on property not in esse may be effectual in equity to give a lien as between the parties, when the property comes into existence and where there are no intervening rights of creditors or third persons." Kribbs v. Alford, 120 N. Y. 519, 24 N. E. 811, recognizes the invalidity at law of a chattel mortgage of property thereafter to be acquired; but holds that, as between the parties, their contract would be construed in equity as creating an equitable lien, which could be enforced. The idea of a chattel mortgage is that of a conveyance of personal property to secure the debt of the mortgagor, which, being conditional at the time, becomes absolute if, at a fixed time, the property is not redeemed; and the statute makes it valid as against creditors of the mortgagor only when filed as directed. The statute provides for the filing as a substitute for "an immediate delivery," or "an actual and continued change of possession of the things mortgaged." Such provisions seem to me to exclude the idea of a chattel mortgage upon nonexistent things, or that such an instrument could operate to defeat the lien of an attaching or an execution creditor upon subsequently acquired property. Regarding the chattel mortgage in question as a mere executory agreement to give a lien when the property came into existence, some further act was necessary in order to make it an actual and effectual lien as against creditors. But there was no further act by the parties to the instrument to create such an actual lien, and the levy of the execution upon the crops operated to transfer their possession from the owner to that of the sheriff. As against his possession, the equities of the mortgagee are unavailing

for any purpose. * * * We are satisfied as to the correctness of the conclusion reached by the general term below that there should have been a direction of a verdict for the plaintiff for the potatoes and beans obtained from the planting done after the execution and delivery of the mortgage. The order appealed from should be affirmed, and, under the stipulation, judgment absolute should be ordered for the plaintiff, with costs in all the courts. All concur, except EARL, J., not voting. Ordered accordingly.[3]

KELLOGG v. LOVELY.

46 Mich. 131, 8 N. W. 699, 41 Am. Rep. 155. 1881.

The facts are stated in the opinion.

GRAVES, J.—The circumstances of this controversy are as follows. In October, 1878, the defendant sold the plaintiff on credit a mare, buggy and harness for the agreed price of $250 and the plaintiff gave his note together with a mortgage on the property for the entire sum.

The mare was with foal and about the first of June following she dropped the colt. On the first of July the mortgage became due, and Kellogg failing to pay, Lovely proceeded to take the property. There was no dispute about his right to take the mare, buggy and harness, but the parties appear to have differed about the colt. Lovely maintained that the mortgage applied to it and gave him the same right to the colt that it did to the mare, but Kellogg contested this claim and contended that the colt being the offspring of the mare was his property and not having been born when the mare was purchased and the mortgage given was not subject to the mortgage.

The colt had not been weaned and was running with the mare and when Lovely drove her off the colt followed. Lovely soon afterwards proceeded to sell the whole property, the colt included, under the mortgage, and we gather from the case that it was bought in for him through an agent. The whole sum for which the property was struck off was $176, and shortly afterwards Kellogg paid the remainder of the debt. He then instituted replevin against Lovely before a justice of the peace to obtain the colt and it was seized on

[3] See Childs' Personal Property, § 110.

the writ and delivered into his possession. The justice entered a nonsuit against him, and Lovely, waiving return of the colt, the value was assessed at $55, for which Lovely took judgment. An appeal was made and the circuit court reduced the assessment to $30 and awarded Kellogg $78 costs and extinguished the former by applying an equal amount of the latter by way of set off. Thereupon Kellogg sold the colt and brought this action of trespass, counting on the transaction when Lovely took the mare on the mortgage. The justice gave judgment in Kellogg's favor for the value of the colt and Lovely appealed. The circuit judge ruled that there was no evidence of trespass and ordered a verdict for Lovely. It is not certain that the circuit judge was correct in the reason on which he proceeded. But whether he was or not is unimportant unless the result was wrong.

The fundamental question in the case relates to the effect on the legal ownership of the colt, of the sale of the mare to Kellogg and the mortgage back. In respect to tame and domestic animals the general rule is well understood, that "the brood belongs to the owner of the dam or mother," (2 Bl. Com. 390), but there are many cases in which the rule is qualified in its application. It has been held and may be true in special cases that where the female is hired for a time limited and has increase during the term, the hirer will be entitled to it and not the general owner. 2 Kent 361; Edwards on B. § 402; Putnam v. Wyley, 8 Johns, 432; Conklin v. Havens, 12 Johns. 314; Hanson v. Millett, 55 N. H. 184; Stewart v. Ball, 33 Miss. 154. And so too it was decided in Linnendoll v. Terhune, that a foal, obtained under an agreement by which the owner of the mare arranged with another person that if he would put her to horse and pay the expense he should have the foal, became the property of such person. 14 Johns. 222.

It is also laid down by Judge Story that where a thing is pledged its natural increase as accessory is also pledged, and he gives by way of illustration the case where a flock of sheep are pledged, and observes that the young afterwards born, are also pledged. Bailment, § 292; and see Domat, part 1, book 3, tit. 1, § 1, art. 7; Kauf. Mackeldey, book 1, § 267. In Iowa and Kentucky, and probably in other states, it has been decided that the young of animals under mortgage are subject to the mortgage, (Forman v. Proctor, 9 B. Mon. 124; Thorpe v. Cowles, 7 N. W. Rep. 677, 3 Iowa 649); and no cases to the contrary have been discovered. Perhaps these last decisions may have originated in the doctrine that the mortgagee of chattels is the legal owner; and the courts may have con-

sidered that in holding the young of mortgaged animals to be subject to the mortgage, they were only applying the general rule which assigns the increase to the owner of the mother. But it is useless to speculate on the subject.

The case before the court belongs to a peculiar and exceptional class, and it may be disposed of without bringing into the question the general doctrine. As previously stated, the mare was carrying her colt when Lovely sold her, and the plaintiff, not paying anything whatever, gave back at the same moment a chattel mortgage for the entire price. There was no interval of time between the sale and mortgage. Each took effect at the same instant. The whole was substantially one transaction. Now it is a rule of natural justice that one who has gotten the property of another ought not as between them to be allowed to keep any part of its present natural incidents or accessories without payment, and that the party entitled should have the right to regard the whole as being subject to his claim. The one ought not to suffer loss, nor the other effect a gain, through a mere shuffle, and whatever fairly belongs to the thing in question, as the young the dam is carrying belongs to her, ought to be as fully bound as the thing itself, unless indeed there are circumstances which imply a different intention.

It is not unreasonable to construe the act of these parties by these principles and to consider that when Lovely sold the mare without receiving anything down and Kellogg gave back the mortgage for the whole purchase price to be due before the colt, according to the ordinary course of things would be old enough to be separated from the mare, it operated as well to hold the colt as to hold the mare herself. The intendment is a fair and just one that the security was to be so far beneficial to Lovely as to preserve to him the right to claim at the maturity of the mortgage the same property he would have had in case he had made no sale. According to this view there was the same right to the colt as to the mare, and the act of seizure sued for was not a trespass. The result ordered by the circuit judge was therefore correct and the judgment must be affirmed with costs.

(The other justices concurred.)[4]

[4] See Childs' Personal Property, §§ 110, 142.

DEMERS v. GRAHAM et al. 4

36 Mont. 402, 93 Pac. 268, 14 L. R. A. (N. S.) 431. 1907.

The facts are stated in the opinion.

SMITH, J.—The only question for determination in this case is whether a chattel mortgage of certain cows covers their calves in gestation at the time the mortgage was executed, but born prior to foreclosure; there being no reference in the mortgage to the increase of the cows. The defendant, Graham, holds in his possession, as sheriff of Missoula county, the sum of $609, the proceeds of the sale of 87 calves, sold by him under a stipulation that he should hold the proceeds until the final determination of this action. The plaintiff claims the money by virtue of the fact that he held a chattel mortgage on the mothers of the calves at the time the young were born. The appellant, Prideaux, claims to be entitled to the sum by virtue of a sale of the calves to him by Sloan, the mortgagor, after the sheriff had seized but before he sold the same under plaintiff's mortgage. Prideaux set forth in his answer the respective claims of the parties, as above recited. The district court of Missoula county sustained a general demurrer to the answer, and, in default of further pleading by Prideaux, entered a judgment in favor of the plaintiff and against the defendant Graham, as sheriff, for the sum of money in dispute. From that judgment Prideaux has appealed.

The law is well settled in this state that a chattel mortgage only creates a lien and does not pass title from the mortgagor to the mortgagee. Bennett Bros. Co. v. Tam, 24 Mont. 457-467, 62 Pac. 780; Mueller v. Renkes, 31 Mont. 100, 77 Pac. 512. Such lien transfers no title. Civ. Code § 3750. The question of the extent of the lien created, in those jurisdictions where no title passes, has been a fruitful source of litigation for many years. The immediate question that we are to decide has never been before this court, and we feel therefore that in the determination of the same we should point out what seem to us to be the principles involved, and not merely cite the precedents of the courts. The Supreme Court of California, in the case of Shoobert v. De Motta, 112 Cal. 215, 44 Pac. 487, 53 Am. St. Rep. 207, took occasion to examine and differentiate the decisions on this subject in the following language: "It has been held in some states that the lien of a mortgage of domestic animals extends to the increase of the

animals during the life of the mortgage, whether the terms of the mortgage include such increase or not, and, following these decisions, such a rule is stated in text-books upon chattel mortgages. It will be found, however, upon examination of these cases, that the decisions therein are based upon the principle of the common law, which was in force in those states, that by the mortgage the mortgagee is vested with the title to the mortgaged property, and becomes the owner thereof; and that in the case of domestic animals, applying another rule of both the common and the civil law, that 'the brood belongs to the owner of the dam or mother, partus sequitur ventrem' (2 Blackstone's Commentaries, 390), he thereby becomes the owner of such increase, and, being the owner, his title in any action at law must prevail. The earliest application of this rule was in the case of a mortgage of a female slave (Hughes v. Graves, 1 Litt. 317), which was decided in Kentucky in 1822, and was afterward followed in Maryland in 1836, in the case of Evans v. Merriken, 8 Gill. & J. 39, which also involved the offspring of a female slave which had been mortgaged; and these cases are cited as the authority upon which cases involving the same question have been decided in other states, in some instances referring also to the principle upon which the rule rests, and in others merely referring to the cases as an authority (Cahoon v. Miers, 67 Md. 573, 11 Atl. 278; Gundy v. Biteler, 6 Ill. App. 510; Ellis v. Reaves, 94 Tenn. 210, 28 S. W. 1089). The rule has also been stated in many other cases in which the question was neither involved nor decided (Kellog v. Lovely, 46 Mich. 131, 8 N. W. 699, 41 Am. Rep. 151; McCarty v. Blevins, 5 Yerg. (Tenn.) 195, 26 Am. Dec. 262; Gans v. Williams, 62 Ala. 41); and there is still another line of decisions in which it has been sought to uphold the propriety of the rule by holding that the increase which was in gestation at the execution of the mortgage was inferentially included therein as a part of the mortgaged property. (Funk v. Paul, 64 Wis. 35, 24 N. W. 419, 54 Am. Rep. 576; Rogers v. Hyland, 69 Iowa, 504, 29 N. W. 429, 58 Am. Rep. 230; Edmonston v. Wilson, 49 Mo. App. 491). Another line of decisions limits this application of the rule by holding that the increase is subject to the lien of the mortgage only for so long a time as the young are in a state of nurture from the mother. Rogers v. Gage, 59 Mo. App. 107; Darling v. Wilson, 60 N. H. 59, 49 Am. Rep. 305; Forman v. Proctor, 9 B. Mon. (Ky.) 124. The want of logical sequence in this limitation has been felt by the courts, and some of them have sought to place their decision upon the fact

that, while the young were following the mother, a purchaser from the mortgagor had notice by that fact that it was her offspring, and subject to the mortgage, and was thus prevented from claiming to be a purchaser in good faith. Placing the decision on this ground is, however, necessarily, a repudiation of the principle upon which all the above cases rest, for, if the mortgagee is in fact the owner of the increase, the question of good faith in a purchase from the mortgagor is immaterial. Prior to 1873 the giving of a chattel mortgage in this state vested the mortgagee with the title to the property mortgaged (Heyland v. Badger, 35 Cal. 404), and, while this rule of law prevailed, the foregoing decisions would have been applicable. The Civil Code, however, went into effect at the beginning of that year, and under its provisions the mortgagor is not, by the execution of the chattel mortgage, divested of his title to the property, but still remains its owner, while the mortgagee has only a lien thereon. Civ. Code, § 2888; Bank of Ukiah v. Moore, 106 Cal. 673, 39 Pac. 1071. Consequently the foregoing decisions cannot be regarded as having authoritative force, but the rights of the parties must be determined upon the general principles controlling the relations between a mortgagor and mortgagee. In the absence of any express agreement upon the subject, the lien created by a mortgage is limited to the property which is described in the mortgage, and does not include other property of the same character which the mortgagor may have afterward acquired and placed with the mortgaged property. Jones on Chattel Mortgages, §§ 138, 154. If the mortgagor retains the possession of the mortgaged property, he is at liberty to deal with and use it as its owner, and whatever income or profit may be derived from such use belongs to him, and not to the mortgagee. See Simpson v. Ferguson, 112 Cal. 180, 40 Pac. 104, 44 Pac. 484, 35 Am. St. Rep. 201. If, in the case of sheep, the use to which he puts the ewes is for breeding lambs, there can be no sufficient reason given why the lambs that are dropped by the ewes should belong to the mortgagee, any more than the wool which is sheared from their backs. We are aware that the Supreme Court of Texas, in First Nat. Bank v. Western Mortgage, etc., Co., 86 Tex., 636, 26 S. W. 488, held that, although by the laws of that state the mortgagor of personal property remains the owner thereof after the execution of the mortgage, the foregoing decisions control the right of the mortgagee to the increase of domestic animals; but the opinion in which the decision is given merely states the proposition without presenting

any reasoning in its support, and does not meet with our approval. We are not called upon to determine in the present case whether, if the lambs in question had been in gestation at the date of the mortgage, they would have been included as a part of the property mortgaged, but we hold that, inasmuch as they were begotten upon the ewes after the mortgage was executed, the mortgagee has no lien upon them, or right to their possession." This case was supplemented by the later case of First Nat. Bank v. Erreca, 116 Cal. 81, 47 Pac. 926, 58 Am. St. Rep. 133, wherein the facts relative to the time at which the offspring were begotten are like those in the case at bar. In that case the court said: "The present case presents a question which was not involved or decided in that case, i. e., whether the lien of the mortgage includes lambs in gestation at its date, but upon the principles of that case it must be held that they are not so included. As the lien of the mortgage extends only to the property described therein, and as the mortgagor remains the owner of the property mortgaged, he has an unrestricted right to sell or dispose of its fruit or increase. His right to dispose of lambs in gestation or wool upon the backs of the sheep at the date of the mortgage is the same as would be his right to dispose of oranges which were on the trees, or wheat which was in the ground or standing in the field when a mortgage of the land was made." We think these cases correctly state the rule of law, and we adopt the conclusions reached together with the reasons assigned therefor.

Section 3893 of the Civil Code reads as follows: "The increase of property pledged is pledged with the property." Counsel for appellant contends that this legislative language ought to be interpreted as showing an intention to lay down a different rule as to pledges, from that pertaining to chattel mortgages. We are inclined to think there is merit in the suggestion.

On the part of the respondent our attention has been directed to section 3815 of the Civil Code, reading as follows: "A mortgage is a lien upon everything that would pass by a grant of the property." It is contended that the foregoing language, applied to this case, means that the lien of the mortgage attached to the calves in question. This section is found in the Code under the following article heading: "Mortgages in General." It applies, therefore, to both real estate and chattel mortgages. There is this analogy between real estate and chattel mortgages, that both are simply liens. Hull v. Diehl, 21 Mont. 71, 52 Pac. 782. A mortgage does not entitle the mortgagee to the possession of the

property, unless authorized by the express terms of the mortgage. Civ. Code, § 3816. While in possession of mortgaged real property the mortgagor may collect and appropriate to his own use the rents and profits thereof. 20 Am. & Eng. Ency. Law (2d Ed.) p. 979, and cases cited. Growing crops may be the subject of chattel mortgage, even though the owner of the same also owns the land upon which they are growing. And this rule prevails even in those jurisdictions where growing crops are part of the realty. 8 Am. & Eng. Ency. Law (2d Ed.) 311; Civ. Code, § 3876. Now it will not be contended that a grant of the land would not pass title to a growing crop. So, too, the sale of a cow would undoubtedly carry with it her unborn calf; but we cannot assent to the conclusion that because thereof, a chattel mortgage describing the cow only would also create a lien upon her offspring.

The statute referred to by the learned counsel is comprehensive, and the construction to be placed upon it should be reached only after full consideration in any particular case in which it may be invoked. We do not think it wise or necessary in this case to construe it further than to hold that it does not apply to the natural increase of domestic animals by procreation. We think, if the Legislature had intended that the lien of a chattel mortgage describing particular animals should attach to their young thereafter to be born, it would have said so plainly, as it did in the case of a pledge. In the absence of such a declaration it seems reasonable to hold that because the mortgage is simply a lien passing no title the mortgagor in possession has the right to deal with the property as his own, and in the case of domestic animals may dispose of the young not mentioned in the mortgage as he sees fit. This construction leaves to the mortgagee the security described in the mortgage, and does away with the confusion that experience has taught invariably follows the adoption of any other rule. If, in cases like this, it be intended to include the offspring, the mortgage should so state.

The judgment of the district court of Missoula county is reversed, and the cause is remanded, with instructions to vacate the order sustaining the demurrer to the appellant's answer, and to enter an order overruling the same.

Reversed and remanded.

BRANTLY, C. J., and HOLLOWAY, J., concur.[5]

[5] See Childs' Personal Property, § 110.

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HOLT v. LUCAS et al.

77 Kan. 710, 96 Pac. 30, 17 L. R. A. (N. S.) 203. 1908.

The facts are stated in the opinion.

PORTER, J.—Plaintiff brought an action in replevin to recover 10 hogs valued at $150 and 11 calves valued at $55. His right to the possession of the property rests upon a chattle mortgage, given by Louis H. Wiggin, dated April 5, 1904. The defendant F. P. Dickson claims the property by virtue of an attachment, levied thereon by the sheriff of Shawnee county subsequent to the date of plaintiff's mortgage. The controversy is over the increase of the stock described in the mortgage. The mortgage includes 7 brood sows, 9 cows and heifers, and all the increase thereof. The defendants claim that plaintiff allowed the calves and pigs in controversy to remain in the possession of the mortgagor after the expiration of the natural weaning period, and after they had ceased to follow their mothers, and that for this reason, as against an attaching creditor, the increase was no longer subject to the mortgage lien. The jury found for defendants, and found the value of the property to be $180. They answered special questions, finding that the note secured by the mortgage was due and unpaid; that the property in controversy is the increase of the stock mentioned in the mortgage; that the 10 hogs were not littered at the time the mortgage was given, and were 20 months old when the action was begun; that the calves were born in the spring of 1905, and were from 8 to 11 months old when the action was commenced. There is also a finding that the property in controversy was in the possession of the mortgagor at the time of the attachment, and that plaintiff had never taken possession of the same under his mortgage. Another finding is that all of the increase had passed the nurture period and were separated from their mothers. The plaintiff filed a motion for judgment on the special findings, notwithstanding the general verdict. This was overruled, and judgment rendered in favor of the defendants, which the plaintiff seeks by this proceeding to reverse.

The principal question involved is whether the increase is subject to the lien of the mortgage, notwithstanding the fact that the nurture period had passed, and that they had ceased to follow their mothers, and were separated therefrom. In Corbin v. Kincaid, 33 Kan. 649, 7 Pac. 145, it was held that a mortgage on

domestic animals, which in terms covers the increase, is valid as to the increase. The question of the duration of the mortgage lien was not involved. A chattel mortgage given upon a crop after the seed sown has sprouted covers the grain, because the latter is an accession to what was already in existence when the mortgage was given; and, by analogy to this doctrine the increase of domestic animals, conceived, but unborn at the time the mortgage is given, may be included therein. This rule is recognized in 6 Cyc. 1049, with the following modification: "But as against a purchaser without actual or constructive knowledge of the mortgage, the lien does not continue after a suitable period of nurture has elapsed." To the same effect is Jones on Chattel Mortgages, § 149. The authorities cited in support of the foregoing texts, so far as we have examined them, are cases in which the increase was not mentioned in the mortgage. The authorities quite generally sanction the rule that a mortgage on domestic animals covers the increase, even though it is silent with reference thereto, and there may be reasonable grounds for holding that, where the mortgage is silent with reference to increase, and is given during the period of gestation, the lien should cover the increase only during the nurture period, but it is not necessary to decide that in this case. Some of the cases which restrict the lien to the nurture period are Forman, etc., v. Proctor, etc., 9 B. Mon. 124; Thorpe Bros. & Co. v. Cowles, 55 Iowa 408, 7 N. W. 677; Kellogg v. Lovely, 46 Mich. 131, 8 N. W. 699, 41 Am. Rep. 151; Winter v. Landphere, 42 Iowa 471; Darling v. Wilson, 60 N. H. 59, 49 Am. Rep. 305; Rogers v. Highland, 69 Iowa 504, 29 N. W. 429, 58 Am. Rep. 230; Rogers v. Gage, 59 Mo. App. 107. In Darling v. Wilson, *supra*, the court said: "There being nothing in the mortgage showing an intention to create a lien upon the increase of stock mortgaged, the lien, existing only as an incident to the mortgage, would, as between the parties, continue so long only as is necessary for the suitable nurture of the increase. This view is supported upon sound principles." In Funk v. Paul, 64 Wis. 35, 24 N. W. 419, 54 Am. Rep. 576, the view taken in Darling v. Wilson is criticized, and the court used this language: There would seem to be no valid reason for terminating the lien as against the mortgagor, merely because the period of 'suitable nurture' had passed. Such nurture did not give the lien, and its termination could not take it away as against the mortgagor." The increase was not mentioned in the mortgage, and the court, while holding the mortgage a valid lien thereon as between the

parties, declared that it would not be valid as against bone fide purchasers without notice. In the present case the mortgage in terms described the increase, and, in our opinion, must be held a valid lien upon such increase as had an actual or potential existence when the mortgage was executed, and binding not only as to the parties themselves, but as to third parties. There appears to be no reason why the lien should be restricted to the period during which the young are following their mothers. The mortgage itself, by the mention of the increase, gives to subsequent purchasers and creditors sufficient notice to place them upon inquiry as to what animals the increase consists of. Cases of hardship frequently arise where live stock covered by a chattel mortgage have altered their appearance by growth, or have been removed to another county, and all the notice which a bona fide purchaser may have that a mortgage is in existence affecting them is constructive notice. * * *

There is another principle of law which is not argued in the briefs, but which in our opinion has a vital bearing upon this case. The common-law doctrine that a chattel mortgage can only operate on property having an actual and potential existence at the time the mortgage is executed has often been recognized, in previous decisions, as the law in this state. Unless the property can be said to be in existence, there is nothing for the mortgage to operate upon, and it is void. Long v. Hines, 40 Kan. 216, 16 Pac. 339, 10 Am. St. Rep. 189, and Id., 220, 19 Pac. 796, 10 Am. St. Rep. 192. So far as third persons are concerned, it can never be treated as a chattel mortgage. Cameron, Hull & Co. v. Marvin, 26 Kan. 612; Townsend v. Allen, 62 Kan. 311, 62 Pac. 1008, 52 L. R. A. 323, 84 Am. St. Rep. 388; Bank v. McIntosh, 72 Kan. 603, 84 Pac. 535. Between the parties the mortgage may be valid, and if, after it comes into existence, the mortgagee take possession, he may hold the property against the mortgagor, or against third persons, as a pledge for the security of his debt. Cameron, Hull & Co. v. Marvin, *supra*. The application of this rule to the case at bar demonstrates that, as to the calves, which from the findings of the jury it appears could not have been in actual or potential existence at the time the mortgage was executed, the judgment is erroneous. The finding is that the calves were from 8 to 11 months old at the time the action was commenced, December 30, 1905. The oldest calves must have been dropped about the first of February, 1905. The date of the mortgage is April 5, 1904. The period of gestation in cows is about 9½ months.

This leaves a margin of about 10 days which, it is true, is slight; but the burden rested upon the mortgagee to establish the fact that the increase was in actual or potential existence when the mortgage was executed. Thorpe Bros. & Co. v. Cowles, 55 Iowa 408, 7 N. W. 677. The hogs were found to be 20 months old December 30, 1905. They were conceived, therefore, about December 30, 1903, several months prior to the date of the mortgage, and, being in potential existence, like a crop of grain, the seed of which has sprouted, were properly the subject of a mortgage lien. The jury found the aggregate value of the hogs and calves to be $180. The value of the calves, apart from that of the hogs, was not found, nor does the aggregate value of both, as found by the jury, correspond with the values alleged in the pleadings and affidavit.

The judgment will therefore be reversed, and the cause remanded, in order that the aggregate value of each may be ascertained, and the plaintiff will then be entitled to recover the value of the hogs, and the defendant the value of the calves.[6]

HUMAN BODIES.

LARSON v. CHASE.

47 Minn. 307, 50 N. W. 238, 28 Am. St. Rep. 370, 14 L. R. A. 85. 1891.

The facts are stated in the opinion.

MITCHELL, J.—This was an action for damages for the unlawful mutilation and dissection of the body of plaintiff's deceased husband. The complaint alleges that she was the person charged with the burial of the body, and entitled to the exclusive charge and control of the same. The only damages alleged are mental suffering and nervous shock. A demurrer to the complainant, as not stating a cause of action, was overruled, and the defendant appealed.

The contentions of defendant may be resolved into two propositions: First. That the widow has no legal interest in or right to the body of her deceased husband, so as to enable her to main-

[6] See Childs' Personal Property, §§ 110, 203.

tain an action for damages for its mutiliation or disturbance; that, if any one can maintain such an action, it is the personal representative. Second. That a dead body is not property, and that mental anguish and injury to the feelings, independent of any actual tangible injury to person or property, constitute no ground of action. Time will not permit, and the occasion does not require us to enter into any extended discussion of the history of the law, civil, common, or ecclesiastical, of burial and the disposition of the body after death. A quite full and interesting discussion of the subject will be found in the report of the referee (HON. S. B. RUGGLES) in Re Widening of Beekman Street, 4 Bradf. Sur. 503. See, also, Peirce v. Proprietors, 10 R. I. 227; 19 Amer. Law Rev. 251; 10 Alb. Law J. 71. Upon the questions who has the right to the custody of a dead body for the purpose of burial, and what remedies such person has to protect that right, the English common-law authorities are not very helpful or particularly in point, for the reason that from a very early date in that country the ecclesiastical courts assumed exclusive jurisdiction of such matters. It is easy to see, therefore, why the common law in its early stages refused to recognize the idea of property in a corpse, and treated it as belonging to no one unless it was the church. The repudiation of the ecclesiastical law and of ecclesiastical courts by the American colonies left the temporal courts the sole protector of the dead and of the living in their dead. Inclined to follow the precedents of the English common law, these courts were at first slow to realize the changed condition of things, and the consequent necessity that they should take cognizance of these matters and administer remedies as in other analogous cases. This has been accomplished by a process of gradual development, and all courts now concur in holding that the right to the possession of a dead body for the purposes of decent burial belongs to those most intimately and closely connected with the deceased by domestic ties, and that this is a right which the law will recognize and protect. The general, if not universal, doctrine is that this right belongs to the surviving husband or wife or to the next of kin; and, while there are few direct authorities upon the subject, yet we think the general tendency of the courts is to hold that, in the absence of any testamentary disposition, the right of the surviving wife (if living with her husband at the time of his death) is paramount to that of the next of kin. This is in accordance, not only with common custom and general sentiment, but also, as we think, with reason. The wife is certainly nearer in

point of relationship and affection than any other person. She is the constant companion of her husband during life, bound to him by the closest ties of love, and should have the paramount right to render the last sacred services to his remains after death. But this right is in the nature of a sacred trust, in the performance of which all are interested who were allied to the deceased by the ties of family or friendship, and, if she should neglect or misuse it, of course the courts would have the power to regulate and control its exercise. We have no doubt, therefore, that the plaintiff had the legal right to the custody of the body of her husband for the purposes of preservation, preparation, and burial, and can maintain this action if maintainable at all.

The doctrine that a corpse is not property seems to have had its origin in the *dictum* of LORD COKE, (3 Co. Inst. 203), where, in asserting the authority of the church, he says: "It is to be observed that in every sepulchre that hath a monument two things are to be considered, viz., the monument, and the sepulture or burial of the dead. The burial of the cadaver that is *caro data vermibus* [flesh given to worms] is *nullius in bonis*, and belongs to ecclesiastical cognizance; but as to the monument action is given, as hath been said, at the common law, for the defacing thereof." If the proposition that a dead body is not property rests on no better foundation than this etymology of the word "cadaver," its correctness would be more than doubtful. But while a portion of this *dictum*, severed from its context, has been repeatedly quoted as authority for the proposition, yet it will be observed that it is not asserted that no individual can have any legal interest in a corpse, but merely that the burial is *nullius in bonis*, which was legally true at common law at that time, as the whole matter of sepulture and custody of the body after burial was within the exclusive cognizance of the church and the ecclesiastical courts. But whatever may have been the rule in England under the ecclesiastical law, and while it may be true still that a dead body is not property in the common commercial sense of that term, yet in this country it is, so far as we know, universally held that those who are entitled to the possession and custody of it for purposes of decent burial have certain legal rights to and in it which the law recognizes and will protect. Indeed, the mere fact that a person has exclusive rights over a body for the purposes of burial leads necessarily to the conclusion that it is his property in the broadest and most general sense of that term, viz., something over which the law accords him exclusive con-

trol. But this whole subject is only obscured and confused by discussing the question whether a corpse is property in the ordinary commercial sense, or whether it has any value as an article of traffic. The important fact is that the custodian of it has a legal right to its possession for the purposes of preservation and burial, and that any interference with that right by mutilating or otherwise disturbing the body is an actionable wrong. And we think it may be safely laid down as a general rule that an injury to any right recognized and protected by the common law will, if the direct and proximate consequence of an actionable wrong, be a subject for compensation.

It is also elementary that while the law as a general rule only gives compensation for actual injury, yet, whenever the breach of a contract or the invasion of a legal right is established, the law infers some damage, and, if no evidence is given of any particular amount of loss, it declares the right by awarding nominal damages. Every injury imports a damage. Hence the complaint stated a cause of action for at least nominal damages. We think it states more. There has been a great deal of misconception and confusion as to when, if ever, mental suffering, as a distinct element of damage, is a subject for compensation. * * * Wherever the act complained of constitutes a violation of some legal right of the plaintiff, which always, in contemplation of law, causes injury, he is entitled to recover all damages which are the proximate and natural consequence of the wrongful act. That mental suffering and injury to the feelings would be ordinarily the natural and proximate result of knowledge that the remains of a deceased husband had been mutilated is too plain to admit of argument. In Meagher v. Driscoll, 99 Mass. 281, where the defendant entered upon plaintiff's land, and dug up and removed the dead body of his child, it was held that plaintiff might recover compensation for the mental anguish caused thereby. It is true that in that case the court takes occasion to repeat the old saying that a dead body is not property, and makes the gist of the action the trespass upon plaintiff's land; but it would be a reproach to the law if a plaintiff's right to recover for mental anguish resulting from the mutilation or other disturbance of the remains of his dead should be made to depend upon whether in committing the act the defendant also committed a technical trespass upon plaintiff's premises, while everybody's common sense would tell him that the real and substantial wrong was not the trespass on the land, but the indignity to the dead. *Order affirmed.*[7]

[7] See Childs' Personal Property, § 111.

KEYES v. KONKEL et al.

119 Mich. 550, 78 N. W. 649, 75 Am. St. Rep. 423, 44 L. R. A. 242. 1899.

Replevin for dead body. Judgment for plaintiff, and defendant appeals.

The facts are stated in the opinion.

MONTGOMERY, J.—This is an action of replevin to recover the dead body of plaintiff's brother. The deceased died at a hospital, and defendants, who are undertakers, took charge of the corpse by request of the hospital authorities. The plaintiff, after the defendants had performed some services in fitting the body for burial, demanded possession of the body, and defendants refused to deliver the body up unless paid for their services. Thereupon plaintiff instituted this suit.

The question presented is whether replevin will lie in this state for a human corpse. The question is happily more novel than difficult. The statute (section 6856, How. Ann. St.) provides for the proceeding of replevin in the justice court, and requires an affidavit by the plaintiff setting forth that his "personal goods and chattels" have been unlawfully taken or are unlawfully detained. The replevin statutes (How. Ann. St. §§ 8346, 8347) provide for a judgment for defendant, when the plaintiff fails in his case, for a return of the property or for its value. It is apparent that no return of the property can be ordered in case of the replevin of a dead body, and it is equally true that its value in money can neither be appraised nor ascertained by a jury. It was formerly held in England that there can be no property in a human body. Williams v. Williams, 20 Ch. Div. 659, also reported in 21 Am. Law. Reg. 508; Guthrie v. Weaver, 1 Mo. App. 141; Meagher v. Driscoll, 99 Mass. 284; Pierce v. Cemetery, 10 R. I. 227; Weld v. Walker, 130 Mass. 422. In certain modern American cases, a dead body has been said to be a quasi property, and the right to control and bury it, and to recover against one who mutilates the corpse, has been maintained. Pierce v. Cemetery, supra; Weld v. Walker, supra; Burney v. Hospital (Mass.) 47 N. E. 401; Larson, v. Chase (Minn.) 50 N. W. 238; Foley v. Phelps (Sup.) 37 N. Y. 471. Recovery for the refusal of the right to bury or for mutilation of the body is rather based upon an

infringement of a right than upon the notion that the property of plaintiff has been interfered with. The recovery in such cases is not for the damage to the corpse as property, but damage to the next of kin by infringement of his right to have the body delivered to him for burial without mutilation. In numerous cases equity has taken jurisdiction to prevent interference with the control of the dead body by persons entitled to control it. See Weld v. Walker, 130 Mass. 422; Pierce v. Cemetery, 10 R. I. 227. And in Reg. v. Fox, 2 Q. B. 246, the remedy by mandamus to a jailer was granted. But on every consideration we are of the opinion that the replevin cannot be maintained. It is not contended that the defendants are entitled to maintain a lien. It is obvious that return cannot be adjudged. The only proper judgment is one dismissing the proceeding, with costs of all the courts to the defendants. It is so ordered. The other justices concurred.[8]

WILD ANIMALS.

GEER v. STATE OF CONNECTICUT.

161 U. S. 519, 16 Sup. Ct. Rep. 600, 40 L. Ed. 793. 1896.

[Action for violation of state game laws. Edgar M. Geer was convicted in the lower courts of violating the game laws of the State of Connecticut. The conviction was affirmed by the Supreme Court of that state. (61 Conn. 144, 22 Atl. 1012). The defendant appealed to the U. S. Supreme Court, alleging that the statute upon which the prosecution was based violated the constitution of the United States.

The facts pertinent to the case, as stated by MR. JUSTICE FIELD, are as follows: "The present proceeding was commenced by an information presented by the assistant district attorney of the City of New London, Conn., against the defendant, Edgar M. Geer, in the police court of that city, charging that he did, on the 19th day of October, 1889, unlawfully receive and have in his possession certain woodcock, ruffled grouse, and quail, killed within the

[8] As to right of action against one who performs an autopsy on a dead body without the consent of the parent, guardian, or next of kin, see Burney v. Children's Hospital, 169 Mass. 57, 47 N. E. 401, 38 L. R. A. 413. Myers v. Duddenhauser (Ky. App.), 90 S. W. 1049, 5 L. R. A. (N. S.) 1096.
See Childs' Personal Property, § 111.

state after the 1st day of October, 1889, with the wrongful and unlawful intention to procure their transportation without the limits of the state."]

he state statutes in question are as follows:

"Every person who shall buy, sell, expose for sale, or have in his possession for the purpose, or who shall hunt, pursue, kill, destroy or attempt to kill any woodcock, quail, ruffled grouse, called partridge, or gray squirrel between the first day of January and the first day of October, the killing or having in possession of each bird or squirrel to be deemed a separate offense. * * * shall be fined not more than $30."

"No person shall at any time kill any woodcock, ruffled grouse or quail for the purpose of conveying the same beyond the limits of the state; or shall transport or have in possession, with intention to procure the transportation beyond said limits, of any such birds killed within this state. The reception by any person within this state of any such bird or birds for shipment to a point without the state shall be prima facie evidence that said bird or birds were killed within the state for the purpose of carrying the same beyond its limits."

MR. JUSTICE WHITE delivered the opinion of the court.

By the statutes of the state of Connecticut, referred to in the statement of facts, the open season for the game birds mentioned therein was from the 1st day of October to the 1st day of January. The birds which the defendant was charged with unlawfully having in his possession on the 19th day of October, for the purpose of unlawful transportation beyond the state, were alleged to have been killed within the state after the 1st day of October. They were therefore killed during the open season. There was no charge that they had been unlawfully killed for the purpose of being transported outside of the state. The offense, therefore, charged, was the possession of game birds, for the purpose of transporting them beyond the state, which birds had been lawfully killed within the state. The court of last resort of the state held, in interpreting the statute already cited, by the light afforded by previous enactments, that one of its objects was to forbid the killing of birds within the state during the open season, for the purpose of transporting them beyond the state, and also additionally as a distinct offense to punish the having in possession, for the pur-

pose of transportation beyond the state, birds lawfully killed within the state. The court found that the information did not charge the first of these offenses, and, therefore, that the sole offense which it covered was the latter. It then decided that the state had power to make it an offense to have in possession, for the purpose of transportation beyond the state, birds which had been lawfully killed within the state during the open season, and that the statute, in creating this offense, did not violate the interstate commerce clause of the constitution of the United States. The correctness of this latter ruling is the question for review. In other words, the sole issue which the case presents is, was it lawful, under the constitution of the United States (section 8, art. 1.), for the state of Connecticut to allow the killing of birds within the state during a designated open season, to allow such birds, when so killed, to be used, to be sold, and to be bought for use, within the state, and yet to forbid their transportation beyond the state? Or, to state it otherwise, had the state of Connecticut the power to regulate the killing of game within her borders so as to confine its use to the limits of the state, and forbid its transmission outside of the state?

In considering this inquiry, we, of course, accept the interpretation affixed to the state statute by the court of last resort of the state. The solution of the question involves a consideration of the nature of the property in game and the authority which the state had a right lawfully to exercise in relation thereto.

From the earliest traditions, the right to reduce animals *ferae naturae* to possession has been subject to the control of the law-giving power. * * *

The common law of England also based property in game upon the principle of common ownership, and therefore treated it as subject to governmental authority.

Blackstone, while pointing out the distinction between things private and those which are common, rests the right of an individual to reduce a part of this common property to possession, and thus acquire a qualified ownership in it, on no other or different principle from that upon which the civilians based such right. 2 Bl. Comm. 1, 12.

Referring especially to the common ownership of game, he says:

"But, after all, there are some few things which, notwithstanding the general introduction and continuance of property, must still unavoidably remain in common, being such wherein nothing but an usufructuary property is capable of being had; and there-

fore they still belong to the first occupant during the time he holds possession of them, and no longer. Such (among others) are the elements of light, air, and water, which a man may occupy by means of his windows, his gardens, his mills, and other conveniences. Such, also, are the generality of those animals which are said to be *ferae naturae* or of a wild and untamable disposition, which any man may seize upon or keep for his own use or pleasure." 2 Bl. Comm. 14.

"A man may lastly have a qualified property in animals *ferae naturae—propter privilegium,* that is, he may have the privilege of hunting, taking, and killing them in exclusion of other persons. Here he has a transient property in these animals usually called 'game' so long as they continue within his liberty, and he may restrain any stranger from taking them therein; but, the instant they depart into another liberty, this qualified property ceases. * * * A man can have no absolute permanent property in these, as he may in the earth and land; since these are of a vague and fugitive nature, and therefore can only admit of a precarious and qualified ownership, which lasts so long as they are in actual use and occupation, but no longer." 2 Bl. Comm. 394.

In stating the existence and scope of the royal prerogative, Blackstone further says:

"There still remains another species of prerogative property, founded upon a very different principle from any that have been mentioned before,—the property of such animals, *ferae naturae,* as are known by the denomination of 'game,' with the right of pursuing, taking, and destroying them, which is vested in the king alone, and from him derived to such of his subjects as have received the grants of a chase, a park, a free warren, or free fishery. * * * In the first place, then, we have already shown, and indeed it cannot be denied, that, by the law of nature, every man, from the prince to the peasant, has an equal right of pursuing and taking to his own use all such creatures as are *ferae naturae,* and therefore the property of nobody, but liable to be seized by the first occupant, and so it was held by the imperial law as late as Justinian's time. * * * But it follows from the very end and constitution of society that this natural right, as well as many others belonging to man as an individual, may be restrained by positive laws enacted for reasons of state or for the supposed benefit of the community. 2 Bl. Comm. 410.

The practice of the government of England from the earliest

time to the present has put into execution the authority to control and regulate the taking of game.

Undoubtedly, this attribute of government to control the taking of animals *ferae naturae,* which was thus recognized and enforced by the common law of England, was vested in the colonial governments, where not denied by their charters, or in conflict with grants of the royal prerogative. * * * Kent, in his Commentaries, states the ownership of animals *ferae naturae,* to be only that of a qualified property. 2 Kent Comm. 347. In most of the states, laws have been passed for the protection and preservation of game. We have been referred to no case where the power to so legislate has been questioned, although the books contain cases involving controversies as to the meaning of some of the statutes. Com. v. Hall, 128 Mass. 410; Com. v. Wilkinson, 139 Pa. St. 298, 21 Atl. 14; People v. O'Neil, 71 Mich. 325, 39 N. W. 1. * * *

The adjudicated cases recognizing the right of the states to control and regulate the common property in game are numerous. In McCrady v. Virginia, 94 U. S. 395 the power of the state of Virginia to prohibit citizens of other states from planting oysters within the tide waters of that state was upheld by this court. In Manchester v. Massachusetts, 139 U. S. 240, 11 Sup. Ct. 559 the authority of the state of Massachusetts to control and regulate the catching of fish within the bays of that state was also maintained. See, also, Phelps v. Racey, 60 N. Y. 10; Magner v. People, 97 Ill. 320; American Exp. Co. v. People, 133 Ill. 649, 24 N. E. 758; State v. Northern Pac. Exp. Co., 58 Minn. 403, 59 N. W. 1100; State v. Rodman, 58 Minn. 393, 59 N. W. 1098; Ex parte Maier, 103 Cal. 476, 37 Pac. 402; Organ v. State, 56 Ark. 270, 19 S. W. 840; Allen v. Wyckoff, 48 N. J. Law 93, 2 Atl. 659; Roth v. State, 51 Ohio St. 209, 37 N. E. 259; Gentile v. State, 29 Ind. 415; State v. Farrell, 23 Mo. App. 176, and cases there cited; State v. Saunders, 19 Kan. 127; Territory v. Evans, 2 Idaho 634, 23 Pac. 115.

While the fundamental principles upon which the common property in game rest have undergone no change, the development of free institutions has led to the recognition of the fact that the power or control lodged in the state, resulting from this common ownership, is to be exercised, like all other powers of government, as a trust for the benefit of the people, and not as a prerogative for the advantage of the government as distinct from the people, or for the benefit of private individuals as distinguished from the public good. Therefore, for the purpose of exercising this power, the state, as held by this court in Martin v. Waddell, 16 Pet. 410,

represents its people, and the ownership is that of the people in their united sovereignty. The common ownership, and its resulting responsibility in the state, is thus stated in a well-considered opinion of the supreme court of California:

"The wild game within a state belongs to the people in their collective sovereign capacity. It is not the subject of private ownership, except in so far as the people may elect to make it so; and they may, if they see fit, absolutely prohibit the taking of it, or traffic and commerce in it, if it is deemed necessary for the protection or preservation of the public good." Ex parte Maier, *ubi supra.*

The same view has been expressed by the supreme court of Minnesota, as follows:

"We take it to be the correct doctrine in this country that the ownership of wild animals, so far as they are capable of ownership, is in the state, not as a proprietor, but in its sovereign capacity, as the representative and for the benefit of all its people in common." State v. Rodman, *supra.*

The foregoing analysis of the principles upon which alone rests the right of an individual to acquire a qualified ownership in game, and the power of the state, deduced therefrom, to control such ownership for the common benefit, clearly demonstrates the validity of the statute of the state of Connecticut here in controversy. The sole consequence of the provision forbidding the transportation of game killed within the state, beyond the state, is to confine the use of such game to those who own it,—the people of that state. The proposition that the state may not forbid carrying it beyond her limits involves, therefore, the contention that a state cannot allow its own people the enjoyment of the benefits of the property belonging to them in common, without at the same time permitting the citizens of other states to participate in that which they do not own. It was said in the discussion at bar, although it be conceded that the state has an absolute right to control and regulate the killing of game as its judgment deems best in the interest of its people, inasmuch as the state has here chosen to allow the people within her borders to take game, to dispose of it, and thus cause it to become an object of state commerce, as a resulting necessity such property has become the subject of interstate commerce; hence controlled by the provisions of article 1, § 8, of the constitution of the United States. But the errors which this argument involves are manifest. It presupposes that, where the killing of game and its sale within the state are allowed, it thereby becomes "commerce" in the legal meaning of that word. In view of the

authority of the state to affix conditions to the killing and sale of game, predicated, as is this power, on the peculiar nature of such property and its common ownership by all the citizens of the state, it may well be doubted whether commerce is created by an authority given by a state to reduce game within its borders to possession, provided such game be not taken, when killed, without the jurisdiction of the state. The common ownership imports the right to keep the property, if the sovereign so chooses, always within its jurisdiction for every purpose. The qualification which forbids its removal from the state necessarily entered into and formed part of every transaction on the subject, and deprived the mere sale or exchange of these articles of that element of freedom of contract and of full ownership which is an essential attribute of commerce. Passing, however, as we do, the decision of this question, and granting that the dealing in game killed within the state, under the provision in question, created internal state commerce, it does not follow that such internal commerce became necessarily the subject-matter of interstate commerce, and therefore under the control of the constitution of the United States. The distinction between internal and external commerce and interstate commerce is marked, and has always been recognized by this court. * * *

The fact that internal commerce may be distinct from interstate commerce destroys the whole theory upon which the argument of the plaintiff in error proceeds. The power of the state to control the killing of and ownership in game being admitted, the commerce in game which the state law permitted was necessarily only internal commerce, since the restriction that it should not become the subject of external commerce went along with the grant, and was a part of it. All ownership in game killed within the state came under this condition, which the state had the lawful authority to impose; and no contracts made in relation to such property were exempt from the law of the state consenting that such contracts be made, provided only they were confined to internal, and did not extend to external, commerce.

* * * The argument of the plaintiff in error substantially asserts that the state statute gives an unqualified right to kill game, when in fact it is only given upon the condition that the game killed be not transported beyond the state limits. It was upon this power of the state to qualify and restrict the ownership in game killed within its limits that the court below rested its conclusion, and similar views have been expressed by the courts of last resort of several of the states. * * *

Aside from the authority of the state, derived from the common ownership of game, and the trust for the benefit of its people which the state exercises in relation thereto, there is another view of the power of the state in regard to the property in game, which is equally conclusive. The right to preserve game flows from the undoubted existence in the state of a police power to that end, which may be none the less efficiently called into play, because, by doing so, interstate commerce may be remotely and indirectly affected. Kidd v. Pearson, 128 U. S. 1, 9 Sup. Ct. 6; Hall v. De Cuir, 95 U. S. 485; Sherlock v. Allings, 93 U. S. 99, 103; Gibbons v. Ogden, 9 Wheat. 194. Indeed, the source of the police power as to game birds (like those covered by the statute here called in question) flows from the duty of the state to preserve for its people a valuable food supply. Phelps v. Racey, 60 N. Y. 10; Ex parte Maier, *ubi supra;* Magner v. People, *ubi supra,* and cases there cited. * * *

MR. JUSTICE BREWER and MR. JUSTICE PECKHAM, not having heard the argument, took no part in the decision of this cause.

MR. JUSTICE HARLAN and MR. JUSTICE FIELD dissent.

Judgment affirmed.[9]

6

GAS AND OIL.

OHIO OIL CO. v. STATE OF INDIANA.

177 U. S. 190, 20 Sup. Ct. Rep. 576, 44 L. Ed. 729. 1900.

Action to restrain waste of natural gas as provided for by statute in the state of Indiana.

[The Ohio Oil Co. is a corporation organized under the laws of Ohio, but authorized to carry on business in the state of Indiana. Said company, in drilling for oil in the gas belt of Indiana, caused great quantities of natural gas to escape, contrary to the Indiana statute relative to the waste of natural gas. The state of Indiana, through its attorney general, filed a complaint in the circuit court of Madison county, Indiana, against the Ohio Oil Co., praying a temporary injunction to restrain said defendant Oil Company from allowing said natural gas to escape, and directing that said defendant be commanded to confine said gas in pipes, tanks, etc. The

[9] See State v. Shaw, p. 131; Goff v. Kilts, p. 132.
See Childs' Personal Property, § 112.

plaintiff further prayed that upon the final hearing of the cause, the defendant be perpetually enjoined and prohibited from further suffering said gas to escape.

The circuit court entered a decree for the plaintiff, which decree the supreme court of the state of Indiana affirmed, whereupon the defendant Oil Company brought error.]

MR. JUSTICE WHITE delivered the opinion of the court:

The assignments of error all in substance are resolvable into one proposition, which is, that the enforcement of the provisions of the Indiana statute as against the plaintiff in error constituted a taking of private property without adequate compensation, and therefore amounted to a denial of due process of law in violation of the Fourteenth Amendment.

* * * The whole contention, therefore, comes to this: That property has been taken without due process of law, in violation of the Fourteenth Amendment, because of the fact that the thing taken was not property, and could not, therefore, be brought within the guaranties ordained for the protection of property.

The confusion of thought which permeates the entire argument is two fold: First, an entire misconception of the nature of the right of the surface owner to the gas and oil as they are contained in their natural reservoir, and this gives rise to a misconception as to the scope of the legislative authority to regulate the appropriation and use thereof. Second, a confounding, by treating as identical, things which are essentially separate; that is, the right of the owner of land to bore into the bosom of the earth, and thereby seek to reduce the gas and oil to possession, and his ownership after the result of the borings has reached fruition to the extent of oil and gas by himself actually extracted and appropriated. In other words, the fallacy arises from considering that the means which the owner of land has a right to use to obtain a result is in legal effect the same as the result which may be reached. We will develop the misunderstanding which is involved in the matters just stated.

No time need be spent in restating the general common-law rule that the ownership in fee of the surface of the earth carries with it the right to the minerals beneath, and the consequent privilege of mining to extract them. And we need not, therefore, pause to consider the scope of the legislative authority to regulate the exercise of mining rights and to direct the methods of their enjoyment so as to prevent the infringement by one miner of the rights of others. Del Monte Min. & Mill. Co. v. Last Chance Min. & Mill.

Co., 171 U. S. 60, 43 L. ed. 74, 18 Sup. Ct. Rep. 895. The question here arising does not require a consideration of the matters just referred to, but it is this: Does the peculiar character of the substances, oil and gas, which are here involved, the manner in which they are held in their natural reservoirs, the method by which and the time when they may be reduced to actual possession or become the property of a particular person, cause them to be exceptions to the general principles applicable to other mineral deposits, and hence subject them to different rules? True it is that oil and gas, like other minerals, are situated beneath the surface of the earth, but except for this one point of similarity, in many other respects they greatly differ. They have no fixed situs under a particular portion of the earth's surface within the area where they obtain. They have the power, as it were, of self-transmission. No one owner of the surface of the earth, within the area beneath which the gas and oil move, can exercise his right to extract from the common reservoir, in which the supply is held, without, to an extent, diminishing the source of supply as to which all other owners of the surface must exercise their rights. The waste by one owner, caused by a reckless enjoyment of his right of striking the reservoir, at once, therefore, operates upon the other surface owners. Besides, whilst oil and gas are different in character, they are yet one, because they are unitedly held in the place of deposit. In Brown v. Spilman, 155 U. S. 665, 669, 670, 39 L. Ed. 304, 305, 15 Sup. Ct. Rep. 245, 247, these distinctive features of deposits of gas and oil were remarked upon. The court said:

"Petroleum gas and oil are substances of a peculiar character, and decisions in ordinary cases of mining for coal, and other minerals which have a fixed situs, cannot be applied to contracts concerning them without some qualifications. They belong to the owner of the land, and are a part of it, so long as they are on it or in it, or subject to his control, but when they escape and go into other land, or come under another's control, the title of the former owner is gone. If an adjoining owner drills his own land and taps a deposit of oil or gas, extending under his neighbor's field, so that it comes into his well, it becomes his property. Brown v. Vandergrift, 80 Pa. 142, 147; Westmoreland & C. Natural Gas Co.'s Appeal, 25 W. N. C. 103.

In Westmoreland & C. Natural Gas Co. v. De Witt, 130 Pa. 235, 5 L. R. A. 731, 18 Atl. 724, the Supreme Court of Pennsylvania considered the character of ownership in natural gas and oil as

these substances existed beneath the surface of the earth. The court said:

"The learned master says gas is a mineral, and while *in situ* is part of the land, and therefore possession of the land is possession of the gas. But this deduction must be made with some qualifications. Gas, it is true, is a mineral; but it is a mineral with peculiar attributes, which require the application of precedents arising out of ordinary mineral rights, with much more careful consideration of the principles involved than of the mere decisions. Water, also, is a mineral, but the decisions in ordinary cases of mining rights, etc., have never been held as unqualified precedents in regard to flowing or even to percolating waters. Water and oil, and still more strongly gas, may be classed by themselves, if the analogy be not too fanciful, as minerals *ferae naturae*. In common with animals, and unlike other minerals, they have the power and the tendency to escape without the volition of the owner. Their 'fugitive and wandering existence within the limits of a particular tract is uncertain,' as said by Chief Justice Agnew in Brown v. Vandergrift, 80 Pa. 147, 148, * * *. They belong to the owner of the land, and are a part of it, so long as they are on or in it, and are subject to his control; but when they escape and go into other land, or come under another's control, the title of the former owner is gone. Possession of the land, therefore, is not necessarily possession of the gas."

In Hague v. Wheeler, 157 Pa. 324, 22 L. R. A. 141, 27 Atl. 714, the question involved in the cause was the right of a land owner who had a gas well on his own land to complain of the escape of gas from a well situated on the land of another. After adverting to the rule embodied in the maxim, *Sic utere tuo ut alienum non laedas*, and after referring to the exceptional nature of the right to acquire ownership in natural gas and oil, it was decided that the complainant was not entitled to relief. The court said (157 Pa. 340, 341, 22 L. R. A. 147, 148, 27 Atl. 719, 720):

"Now, it is doubtless true that the public has a sufficient interest in the preservation of oil and gas from waste to justify legislation upon this subject. Something has been done in this direction already by the acts regulating the plugging of abandoned wells. * * * In the disposition he may make of it [private property] he is subject to two limitations. He must not disregard his obligations to the public. He must not disregard his neighbor's rights. If he uses his product in such a manner as to violate any rule of public policy, or any positive provision of the written law, he

brings himself within the reach of the courts. If the use he makes of his own, or its waste, is injurious to the property or the health of others, such use or waste may be restrained, or damages recovered therefor; but, subject to these limitations, his power as an owner is absolute until the legislature shall, in the interest of the public, as consumers, restrict and regulate it by statute." * * *

A brief examination of the Indiana decisions on the subject of oil and natural gas, and the right to acquire ownership thereto will make it apparent that from the peculiar nature of these substances courts of that state have announced the same rule as that recognized by this court in Brown v. Spilman, 155 U. S. 665, 669, 670, 39 L. Ed. 304, 305, 15 Sup. Ct. Rep. 245, and which has been applied by the Supreme Court of the State of Pennsylvania. * * *

"It has been settled in this state that natural gas, when brought to the surface of the earth and placed in pipes for transportation, is property, and may be the subject of interstate commerce. State v. Indiana & O. Oil, Gas & Min. Co., 120 Ind. 575, 6 L. R. A. 579, 22 N. E. 778. Water, petroleum, oil, and gas are generally classed by themselves as minerals possessing in some degree a kindred nature."

After quoting authorities relating to subterranean currents of water, and treating gas and oil before being reduced to possession as of a kindred nature, the court said:

"Like water it is not the subject of property except while in actual occupancy, and a grant of either water or oil is not a grant of the soil or of anything for which ejectment will lie."

The case of Brown v. Vandergrift, 80 Pa. 142, from which we have previously quoted, was then referred to, and the analogies between oil and gas and animals *ferae naturae* were approved and adopted. * * *

Without pausing to weigh the reasoning of the opinions of the Indiana court in order to ascertain whether they in every respect harmonize, it is apparent that the cases in question, in accord with the rule of general law, settle the rule of property in the state of Indiana to be as follows: Although in virtue of his proprietorship the owner of the surface may bore wells for the purpose of extracting natural gas and oil until these substances are actually reduced by him to possession, he has no title whatever to them as owner. That is, he has the exclusive right on his own land to seek to acquire them, but they do not become his property until the effort has resulted in dominion and control by actual possession. It is also clear from the Indiana cases cited that, in the absence of regula-

tion by law, every owner of the surface within a gas field may prosecute his efforts and may reduce to possession all or every part, if possible, of the deposits, without violating the rights of the other surface owners.

If the analogy between animals *ferae naturae* and mineral deposits of oil and gas, stated by the Pennsylvania court and adopted by the Indiana court, instead of simply establishing a similarity of relation, proved the identity of the two things, there would be an end of the case. This follows because things which are *ferae naturae* belong to the "negative community;" in other words, are public things subject to the absolute control of the state, which, although it allows them to be reduced to possession, may at its will not only regulate, but wholly forbid, their future taking. Geer v. Connecticut, 161 U. S. 519, 525, 40 L. Ed. 793, 795, 16 Sup. Ct. Rep. 600. But whilst there is an analogy between animals *ferae naturae* and the moving deposits of oil and natural gas, there is not identity between them. * * * In things *ferae naturae* all are endowed with the power of seeking to reduce a portion of the public property to the domain of private ownership by reducing them to possession. In the case of natural gas and oil no such right exists in the public. It is vested only in the owners in fee of the surface of the earth within the area of the gas field. This difference points at once to the distinction between the power which the lawmaker may exercise as to the two. In the one, as the public are the owners, every one may be absolutely prevented from seeking to reduce to possession. No devesting of private property under such a condition can be conceived, because the public are the owners. * * * On the other hand, as to gas and oil the surface proprietors within the gas field all have the right to reduce to possession the gas and oil beneath. They could not be absolutely deprived of this right which belongs to them without a taking of private property. But there is a coequal right in them all to take from a common source of supply the two substances which in the nature of things are united, though separate. It follows from the essence of their right and from the situation of the things as to which it can be exerted, that the use by one of his power to seek to convert a part of the common fund to actual possession may result in an undue proportion being attributed to one of the possessors of the right to the detriment of the others, or by waste by one or more to the annihilation of the rights of the remainder. Hence it is that the legislative power, from the peculiar nature of the right and the objects upon which it is to be exerted, can be mani-

fested for the purpose of protecting all the collective owners, by securing a just distribution, to arise from the enjoyment, by them, of their privilege to reduce to possession, and to reach the like end by preventing waste. * * * Viewed, then, as a statute to protect or to prevent the waste of the common property of the surface owners, the law of the state of Indiana which is here attacked because it is asserted that it devested private property without due compensation, in substance, is a statute protecting private property and preventing it from being taken by one of the common owners without regard to the enjoyment of the others. * * *

In view of the fact that regulations of natural deposits of oil and gas and the right of the owner to take them as an incident of title in fee to the surface of the earth, as said by the supreme court of Indiana, is ultimately but a regulation of real property, and they must hence be treated as relating to the preservation and protection of rights of an essentially local character. Considering this fact and the peculiar situation of the substances, as well as the character of the rights of the surface owners, we cannot say that the statute amounts to a taking of private property, when it is but a regulation by the state of Indiana of a subject which especially comes within its lawful authority.

Affirmed.[10]

7

TENANCY IN COMMON.

CUSHING et al. v. BREED et al.

96 Mass. 376, 92 Am. Dec. 777. 1867.

Action to recover the price of five hundred bushels of oats.

[The facts appear to be that the plaintiffs owned a cargo of oats, containing 6,695 bushels, which they stored in an elevator owned and operated by the Merchants' Grain Elevator of Boston. The plaintiffs thereafter agreed to sell to the defendants 500 bushels of the grain thus stored, at ninety-one cents a bushel, and to that purpose, gave to the defendants an order upon the elevator company which read as follows: "Please deliver Breed & Co. or order five hundred bushels black oats from cargo per schooner Seven Brothers, storage commencing, to the person or persons in

[10] See Childs' Personal Property, § 113.

whose favor this order is drawn, June 29, 1864." The order was presented to the elevator company and was accepted and duly entered in their books. The elevator company at once delivered to the defendants one hundred and five bushels of the oats. Shortly after, and before the remaining quantity of oats was delivered, the elevator burned without the fault of either plaintiffs or defendants. The court found that the plaintiffs were entitled to recover only for the value of the one hundred and five bushels, whereupon the plaintiffs appealed.]

CHAPMAN, J.—The use of elevators for the storage of grain has introduced some new methods of dealing, but the rights of parties who adopt these methods must be determined by the principles of the common law. The proprietors of the elevator are the agents of the various parties for whom they act. When several parties have stored various parcels of grain in the elevator, and it is put into one mass, according to a usage to which they must be deemed to have assented, they are tenants in common of the grain. Each is entitled to such a proportion as the quantity placed there by him bears to the whole mass. When one of them sells a certain number of bushels, it is a sale of property owned by him in common. It is not necessary to take it away in order to complete the purchase. If the vendor gives an order on the agents to deliver it to the vendee, and the agents accept the order, and agree with the vendee to store the property for him, and give him a receipt therefor, the delivery is thereby complete, and the property belongs to the vendee. The vendor has nothing more to do to complete the sale, nor has he any further dominion over the property. The agent holds it as the property of the vendee, owned by him in common with the other grain in the elevator. It is elementary law that a tenant in common of personal property in the hands of an agent may sell the whole or any part of his interest in the property, by the method above stated, or by any other method equivalent to it. Actual separation and taking away are not necessary to complete the sale. As to the property sold, the agent acts for a new principal, and holds his property for him. The law is the same, whether the proprietors are numerous or the vendor and vendee are owners of the whole. If the vendee resells the whole or a part of what he has purchased, his vendee may, by the same course of dealing, become also a tenant in common as to the part which he has bought.

This is not like the class of sales where the vendor retains the

possession, because there is something further for him to do, such as measuring, or weighing, or marking, as in Scudder v. Worster, 11 Cush. 573; nor like the case of Weld v. Cutler, 2 Gray 195, where the whole of a pile of coal was delivered to the vendee in order that he might make the separation. But the property is in the hands of an agent; and the same person who was the agent of the vendor to keep, becomes the agent of the vendee to keep; and the possession of the agent becomes the possession of the principal. Hatch v. Bayley, 12 Cush. 27, and cases cited. The tenancy in common results from the method of storage which has been agreed upon, and supersedes the necessity of measuring, weighing, or separating the part sold.

No delivery is necessary to a tenant in common. Beaumont v. Crane, 14 Mass. 400.

Upon these principles, the plaintiffs are entitled to recover the amount due them for the property thus sold and delivered to the defendants. The damage occasioned to this property by the fire must be borne by the defendants, as owners of the property.

Exceptions sustained.[11]

8

JOINT TENANCY.

WAIT v. BOVEE.

35 Mich. 425. 1877.

The facts are stated in the opinion.

GRAVES, J.—This controversy is between the estate of the husband on the one hand and that of the wife on the other, and it presents a single question.

At the time of their intermarriage the decedents were respectively possessed of about two thousand eight hundred dollars, and each had children by a former marriage.

Their marriage occurred in 1852, and each thereafter recognized the separate property rights of the other. They made investments jointly, each supplying half of the means, and they took all securities in their joint names. This course continued until March, 1873, when the husband died. At this time the personalty so

[11] See Childs' Personal Property, § 132.

handled and situated had swelled to a considerable amount. No question is involved concerning right to real estate, or any question concerning the rights of creditors. The point is confined to the right to this personalty as between the two estates, the wife also being now deceased. On the part of her estate it was claimed below and is here, that in regard to these securities taken in the joint names, the old law of survivorship governs, and that as she outlived her husband she took the whole.

On the other side it is urged that no such rule now prevails in this state, whatever may have been the case formerly, and that the law now recognizes and protects the property interests of husband and wife in joint securities as separate and distinct interests when particular circumstances do not exist to show a contrary intention in the parties.

The judge of probate ruled against the right of survivorship claimed on behalf of the wife, and his order was appealed from to the circuit court. That portion of his order which so decreed was there reversed, and it was decided that by force of the law of survivorship the wife took the whole. The conclusion of the probate court was correct, and that of the circuit court was erroneous. As the case stood, the question was upon the bare legal effect of the husband's death in the lifetime of the wife upon the right to the securities taken by them jointly. Our own decisions relative to the rights of husband and wife in case of united holdings of real estate, afford no argument here. They were grounded upon the statutory preservation of the common-law doctrine, which originated in and was developed by a policy not pertinent to cases of taking and holding of personal securities. There is no question on evidence as to whether there was a gift by the husband to the wife, or a contingent relinquishment of right by one to the other; the case fairly excludes all considerations of that kind. Prior to the husband's death each held an individual divisible interest. As between the two and before the husband's death, the law would have considered that each owned an equal half, and not that their respective interests were consolidated into an entirety held by the two as one person. By the law of 1846, which was a re-enactment with some change of the law of 1844, the estate Mrs. Wait owned on her marriage with decedent Justin Wait, was kept and preserved to her as her separate property after the marriage to the "same extent as before marriage."—Sess. L. 1844, p. 77-78; R. S. 1846, p. 340, § 25. Hence, during the husband's lifetime, and up to the act of 1855, the marriage and taking the

securities in the joint names had not the effect as matter of law to blend the respective interests and consolidate them into one.

The preservation of the property interest of the wife as something distinct and separate is repugnant to such a blending, and inconsistent with the common-law doctrine advanced.

The act of 1855, which was passed some three years after the marriage, goes further than the earlier ones in the same direction.—2 C. L., pp. 1477, 1478.

She held her property interest as though she were sole, and the bare fact that the securities were taken in the joint names, could no more change the holding into one by entirety than it would if the parties had not been married. Indeed the tenure was just what it would have been if the parties had been unmarried.

Her right was separate and distinguishable up to her husband's death, and under the impress of the statute it continued so, and his right was therefore necessarily separate and disguishable from hers, and so continued.

There could be no blending so long as the law kept her right distinct.

The drift of policy and opinion, as shown by legislation and judicial decisions, is strongly adverse to the doctrine of taking by mere right of survivorship, except in a few special cases, and it should not be applied except where the law in its favor is clear.

There must be a reversal of the order of the circuit court and an affirmance of the order of the probate court.

The plaintiffs in error will recover their costs of this court and of the circuit court.

The other justices concurred.[12]

9

WHITEHEAD v. SMITH.

19 R. I. 135, 32 Atl. 168. 1895.

The facts are stated in the opinion.

TILLINGHAST, J.—The agreed statement of facts in this case shows that the deposits in the Peoples Savings Bank and the Industrial Trust Company, both of Providence, the ownership of which

[12] See Childs' Personal Property, § 135.

deposits is brought in question, were made by James Whitehead, the deceased, to the account of James Whitehead or Martha A. Smith (his daughter), and were payable to either or the survivor of them; that said James Whitehead deceased April 6, 1893, at East Providence in this State, leaving a widow and two children, and that there was remaining in said Peoples Savings Bank to the credit of said account at that time, the sum of $665.86, and in said Industrial Trust Company to the credit of said account, the sum of $703.58, which said sums were subsequently withdrawn by and appropriated to the use of said Martha A. Smith, she claiming the right so to do as the survivor of James Whitehead. And the only question raised by the appellant is as to the ownership of said deposits, he claiming that they belonged to said James Whitehead at the time of his death, and hence should now be held and accounted for as property belonging to the estate, by the administratrix, while said Martha claims that the same, upon the death of James Whitehead belonged to her as aforesaid. We think it is clear that said deposits were the joint property of said James Whitehead and Martha A. Smith during their joint lives, and that upon the death of James Whitehead the title thereto vested immediately and absolutely in the survivor, Mrs. Smith. Mack v. Mechanics & Farmers' Savings Bank, 50 Hun. 477. And this being so she was not called upon to account for said deposits as administratrix. The case is clearly distinguishable from that of the Providence Institution for Savings v. Carpenter, 18 R. I. 287, relied on by counsel for appellant. In that case the understanding was that the money was to remain the property of the depositor during her life subject to her own control, and at her death to be the property of Miss Carpenter for the purpose of applying it to certain specified religious and charitable uses. So that in that case under the proof submitted there was no joint estate, but simply a deposit which, while it stood to the credit of "Margaret Hart or Mary F. Carpenter" on the books of the bank, belonged solely to said Margaret and was so to continue during her life. In short the proof in that case showed that said Margaret attempted by means of the deposit and the agreement or understanding with Mrs. Carpenter relative thereto to make a purely testamentary disposition of said fund. The case, therefore, has no bearing upon the one now before us. In this case the deposits not only stood on the books of the bank to the credit of James Whitehead or Martha A. Smith or the survivor of them, but the uncontradicted testimony of Mrs. Smith which is made a part of the agreed state-

ment of facts shows that said James Whitehead intended that the deposits should become and remain the joint property of himself and his said daughter during their joint lives, and in case she survived him, that whatever remained thereof should belong to her.

A decree may be entered confirming the decree of the Probate Court in the premises, but by virtue of the agreement of the parties, without cost to either party.[13]

[13] See Childs' Personal Property, § 135.

CHAPTER VII.

HOW PROPERTY COMES INTO EXISTENCE.

SEVERANCE.

KELLY v. OHIO OIL CO.

57 Ohio St. 317, 49 N. E. 399. 1897.

[The plaintiff, Thomas C. Kelly, brought action against the defendant Oil Co. to restrain said company from operating certain oil wells, and to account to the plaintiff for the oil so taken. Judgment for defendant and plaintiff appealed.

The plaintiff was lessee of oil lands adjoining lands of the defendant Oil Co. The defendant company drilled wells close to and along the line of the plaintiff's land, thereby draining the plaintiff's land, as he alleged, of the oil in and under said land. The plaintiff further alleged that it was practically a universal custom of oil operators to locate their wells at least 200 feet from the boundary line of adjoining lands.]

BURKET, C. J.—The question is not as to the motive—fraud or malice—which may have induced the oil company to drill the wells sought to be enjoined. The only question of practical importance is, had the oil company the legal right to drill the wells? When a person has the legal right to do a certain act, the motive with which it is done is immaterial. The right to acquire, enjoy, and own property carries with it the right to use it as the owner pleases, so long as such use does not interfere with the legal rights of others. To drill an oil well near the line of one's land cannot interfere with the legal rights of the owner of the adjoining lands, so long as all operations are confined to the lands upon which the well is drilled. Whatever gets into the well belongs to the owner of the well, no matter where it came from. In such cases the well and its contents belong to the owner or lessee of the land, and no one can tell to a certainty from whence the oil, gas, or water which

enters the well came, and no legal right as to the same can be established or enforced by an adjoining landowner. The right to drill and produce oil on one's own land is absolute, and cannot be supervised or controlled by a court or an adjoining landowner. So long as the operations are legal, their reasonableness cannot be drawn in question. As was pointed out in Letts v. Kessler, 54 Ohio St. 73, 42 N. E. 765, it is intolerable that the owner of real property, before making improvements on his own lands, should be compelled to submit to what his neighbor or a court of equity might regard as a reasonable use of his property. Petroleum oil is a mineral, and while in the earth it is part of the realty, and, should it move from place to place by percolation or otherwise, it forms part of that tract of land in which it tarries for the time being, and, if it moves to the next adjoining tract, it becomes part and parcel of that tract; and it forms part of some tract until it reaches a well, and is raised to the surface, and then for the first time it becomes the subject of distinct ownership, separate from the realty, and becomes personal property,—the property of the person into whose well it came. And this is so whether the oil moves, percolates, or exists in pools or deposits. In either event, it is the property of, and belongs to, the person who reaches it by means of a well, and severs it from the realty, and converts it into personalty. While it is generally supposed that oil is drained into wells for a distance of several hundred feet, the matter is somewhat uncertain, and no right of sufficient weight can be founded upon such uncertain supposition to overcome the well-known right which every man has to use his property as he pleases, so long as he does not interfere with the legal rights of others. Protection of lines of adjoining lands by the drilling of wells on both sides of such lines affords an ample and sufficient remedy for the supposed grievances complained of in the petition and supplemental petition, without resort to either an injunction or an accounting. The cases of Coal Co. v. Tucker, 48 Ohio St. 41, 26 N. E. 630, and Collins v. Gas Co., 131 Pa. St. 143, 18 Atl. 1012, and other like cases, in which some harmful substance was sent, conveyed, or caused to go from the premises of one to the premises of another, have no application here, because in this case nothing reached the plaintiff's lands from the premises of the defendant, and the only complaint is that the oil company so used its own premises as to secure and appropriate to its own use that which came into its lands by percolation, or by flowing through unknown natural underground channels. This it had a right to do. While

the drilled oil well is artificial, the pores and channels through which the oil reached the bottom of the well are natural.

Judgment affirmed.[1]

ACCESSION.

See Kellogg v. Lovely, p. 244; Demers v. Graham, p. 247; Holt v. Lucas, p 252; Ayre v. Hixson, p. 289.

OCCUPANCY.

MATHER et al. v. CHAPMAN.

40 Conn. 382, 16 Am. Rep. 46. 1873.

The facts are stated in the opinion.

SEYMOUR, C. J.—The first count of the plaintiffs' declaration is in trespass for the taking and converting to his own use by the defendant of large quantities of sea-weed alleged to be the proper goods and estate of the plaintiffs. This sea-weed was cast upon the shore adjoining the defendant's land, and was there, below high-water mark, taken by the defendant and converted to his own use. The Court of Common Pleas, against the request of the plaintiffs, instructed the jury, in substance, that sea-weed cast and left upon the shore (that is, between ordinary high and low-water mark), prima facie belongs to the public and may lawfully be appropriated by the first occupant.

To this charge the plaintiffs object, and the principal question in the case arises upon this objection.

A different question arises under the second count, which will be considered in its proper place.

It is conceded that by the settled law of Connecticut the title of a riparian proprietor terminates at ordinary high-water mark. It is also conceded that though his title in fee thus terminates, yet he has certain privileges in the adjoining waters.

Among the most important of these privileges are: (1) That of access to the deep sea. (2) The right to extend his lands into the water by means of wharves, subject to the qualification that he thereby does no injury to the free navigation of the water by

[1] See Childs' Personal Property, §§ 140, 141.

the public. (3) The right by accretion to whatever lands by natural or artificial means are reclaimed from the sea, subject however to certain qualifications not necessary here to be mentioned.

The plaintiffs claim that among the privileges of the riparian proprietor is also that of the exclusive right to the sea-weed which is cast upon the shore and left there by the receding tide.

In respect to the weed cast by extraordinary floods upon the land of the proprietor and there left above ordinary high-water mark, the law of this state is settled, in conformity with what we understand to be the common law of England. The owner of the soil has it *ratione soli.* No other person can then take it without a trespass upon the owner's land, and as owner of the land he is deemed to be constructively the first occupant.

But below high-water mark the soil does not belong to the owner of the upland. The sea-weed in dispute was not taken from the plaintiffs' land, and their title, if they have a title, is not *ratione soli.* No trespass on the plaintiffs' land was committed by the defendant in taking the weed, for the taking of which recovery is sought in this count.

Upon what ground then can the plaintiffs sustain the title which they claim to the weed? While it was floating on the tide it was *publici juris.* Why, when it is left on the shore by the receding tide, should it become their property?

In Massachusetts and Maine, by virtue of the Colonial Ordinance of 1641, the individual title of proprietors adjoining navigable water extends to low-water mark. Sea-weed left by the receding tides being then on private property, the owner of the soil has title *ratione soli,* not only to sea-weed but to other articles cast upon and left on the shore. Thus in Barker v. Bates, 13 Pick. 255, a stick of timber was thrown up and had lodged on the shore within the old colony of Plymouth. The question is largely discussed by Shaw, Ch. J. The learned judge proceeds to say: "Considering it as thus established that the place upon which this timber was thrown and had lodged was the soil and freehold of the plaintiff, the defendants cannot justify their entry for the purpose of taking away or marking the timber. We are of opinion that such entry was a trespass, and that, as between the plaintiff and defendant, the plaintiff had in virtue of his title to the soil the preferable right of possession, and that the plaintiff has a right to recover the agreed value of the timber."

The cases therefore in Massachusetts and Maine which decide that sea-weed left on the shore belongs to the riparian proprietor

have no application here. In New Hampshire the Massachusetts ordinance is adopted as law.

In New York the common law rule is adopted, as with us, in relation to the boundary line between the public and the riparian proprietor, and it is claimed that in Emans v. Turnbull, 2 Johns. R. 313, the question before us is decided in conformity with the plaintiff's claim. The judgment in that case is pronounced by a judge of profound learning, whose opinion upon the point now under discussion, if really given, would be entitled to great weight; but we are inclined to think that the sea-weed in that case was cast upon the land of the plaintiff. The main argument at the bar and on the bench relates to the title to the *locus in quo.* Chief Justice Kent says:—"If the marine increase be by small and imperceptible degrees, it goes to the owner of the land. The sea-weed must be supposed to have accumulated gradually."

In the case we are called on to decide the sea-weed could not be regarded as a marine increase of the plaintiffs' land, for it had not reached their land and was not attached to it nor part and parcel of the land itself. Being between high and low-water mark, at each returning tide it would be afloat, and even in Massachusetts sea-weed when afloat is *publici juris,* although floating over soil which is private property.

The sea-weed in this suit is not treated as part of the real estate which by small and imperceptible degrees had become part of the plaintiffs' land. It is treated as personal property, and the defendant is sued for taking it as such and converting it to his own use. In the case of Emans v. Turnbull the plaintiff's title was held good upon a liberal construction of the *jus alluvionis,* which implies that the weed had then become part and parcel of the plaintiff's land and must therefore have been above or upon ordinary high-water mark. Title to personal property *jure alluvionis* would be a novelty in the law. 2 Black. Com. 262. Title by accretion is substantially the same as by alluvion. Both are modes of acquiring title to real property.

Title however to personal property may be acquired by what in law is called accession, but to acquire title by accession the accessory thing must be united to the principal, so as to constitute part and parcel of it. *"Accessio"* is defined by Bouvier as "a manner of acquiring the property in a thing which becomes united with that which a person already possesses." The plaintiffs therefore seem to us to have no title by alluvion, or by accretion, or by

accession, certainly none *ratione soli,* and they cannot be regarded as first occupants by construction merely because of the propinquity of their land to the property in dispute.

The question under discussion does not seem to be fully settled in England. The soil of the sea-shore is there, as with us, prima facie in the public, but it may become private property, and frequently is so, where the adjoining lands are part of the manor. The authority of Bracton is clearly in favor: (1) of the common right of all to the shores of the sea as part of the sea itself. (2) In Liber 2, speaking of the right of first occupancy, he says, "*Item, locum habet eadem species occupationis in iis quae communia sunt, sicut in mare et littore maris, in lappillis et geminis et ceteris in littore maris inventis.*" Sea-weed must be included within the *et ceteris* of Bracton in this passage, and upon his authority belongs to the first occupant.

The opinion of Lord Hale in favor of the common right to take sea-weed on the shore is shown by the following passage in Chapter 6 of Hale de Jure Maris. After speaking of three kinds of shore he says, "This kind of shore, to-wit, that which is covered by the ordinary flux of the ocean, may belong to a subject, and may be parcel of a manor, and the evidences to prove it parcel of a manor are commonly these, constant and usual fetching of gravel and sea-weed and sea-sand, between high and low-water mark, and licensing others so to do." * * *

The case of Church v. Meeker, 34 Conn. R. 421, is relied upon by both parties. We think the opinion of Judge Butler in that case must be construed as applicable solely to sea-weed found as it there was above high-water mark.

In the case of Peck v. Lockwoood, 5 Day 22, the plaintiff owned a portion of the shore below ordinary high-water mark, and it was held that he could not maintain the trespass against the defendant, who entered the premises when the tide was out and dug for shell fish and carried the fish away. That is a strong case in favor of the common right of fishing.

But the right of taking sea-weed would seem to stand on the same ground as the right of taking fish. We see no reason for making a distinction between the vegetable and animal products of the ocean. Neither in the state of nature is the property of any one; the title to both depends upon the first occupancy. It is agreed that while afloat both are alike common; why, when the tide recedes and leaves shell-fish and sea-weed on the shore, should

the sea-weed belong to the riparian proprietor when confessedly the shell-fish remains common property.

We think the charge of the judge in regard to the first count was correct.

(Judgment reversed on another ground.) [2]

[2] See Childs' Personal Property, § 144.

CHAPTER VIII.

TRANSFER OF PROPERTY BY ACT OF THE PARTIES.

Chattel Mortgage.

Definition, Nature of.

HANNAH & HOGG v. RICHTER BREWING CO. et al.

149 Mich. 220, 112 N. W. 713, 119 Am. St. 674, 12 L. R. A. (N. S.) 178. 1907.

The facts are stated in the opinion.

McAlvay, C. J.—But one question is involved in this appeal, and that is whether the giving of a chattel mortgage is a sale, transfer, or assignment, in bulk, within the meaning of Act No. 223, p. 322, Pub. Acts 1905, entitled "An act to regulate the sales, transfers and assignments of stocks of goods, merchandise and fixtures in bulk." Defendant Oliver Hotel Company, in connection with its business conducted a bar where liquors were sold. On February 21, 1906, it gave defendant Richter Brewing Company a chattel mortgage upon the entire bar fixtures pertaining to its liquor business, and afterwards made a sale in bulk of the same property to the other defendants. The hotel company was, before giving his chattel mortgage, indebted to complainant, which, on May 29, 1906, put its claim into judgment for $273 damages and $2.95 costs of suit. On June 5, 1906, an execution issued and a levy was made upon this property, and demand was made of defendants to turn the same over to complainant and release all claim of ownership or title thereto. This demand was refused, and the bill of complaint in this case was filed, upon the theory that the disposition of this property was within the prohibition of the statute invoked, and complainant asked the court to declare the instruments void for that reason, and prayed for other relief. Defendant Richter Brewing Company demurred, raising the question involved. The demurrer was sustained, and

a decree entered dismissing the bill of complaint as to demurring defendant.

So much of this statute as is now necessary to quote provides: "The sale, transfer or assignment, in bulk, of any part or the whole of a stock of merchandise, or merchandise and the fixtures pertaining to the conducting of said business, otherwise than in the ordinary course of trade, and in the regular and usual prosecution of the business of the seller, transferrer or assignor, shall be void as against the creditors of the seller, transferrer or assignor, unless" etc., giving the notice and proceedings necessary in order to make the transaction valid. While many of the courts hold to the common-law doctrine that a chattel mortgage is an instrument of sale conveying the title of the property, this court has held that the true relation of parties to a chattel mortgage is that of debtor on one side and creditor secured by lien on the other. Lucking v. Wesson, 25 Mich. 443. And also that the title of a mortgagee of chattels does not become absolute until foreclosure and sale. Kohl v. Lynn, 34 Mich. 360, and cases cited. It is the settled law of this state that a chattel mortgage is not an assignment. Sheldon v. Mann, 85 Mich. 265; 48 N. W. 573; Warner v. Littlefield, 89 Mich. 329, 50 N. W. 721; Wineman v. Fisher, 118 Mich. 636, 77 N. W. 245. * * * To hold a chattel mortgage within the meaning of the statute it is necessary to hold that it is a sale within the common acceptation of that term, transferring the entire title, and entitling the vendee to immediate possession. This, by the specific terms of this mortgage, which are the same as those of chattel mortgages generally in this state, and under our decisions above cited, cannot be done. The argument is advanced that, having adopted this statute, the court will follow the construction given by the courts of those states from which it is taken. The custom referred to has no binding force upon the courts of the adopting state. In the case at bar the custom cannot be followed, for the reason that no construction has yet been given upon the point involved, and, if construction had been given favorable to complainant, it could not be followed because those states accept the common-law doctrine that a chattel mortgage is an instrument of sale conveying the title of the property, which, as above shown, does not prevail in this state.

We agree with the learned circuit judge that chattel mortgages are not included in the act.

The decree is affirmed, with costs.[1]

[1] See Childs' Personal Property, § 195.

AYRE v. HIXSON et al.

53 Oreg. 19, 98 Pac. 515. 1908.

This is an action to foreclose four mortgages. The facts pertinent to the case are as follows:

[The plaintiff sold to the defendants some ewes, about 530 in number, and also loaned them $1,572 for which they (the defendants) gave a promissory note. To secure the payment of the loan, the defendants gave the plaintiff a mortgage on the sheep and their increase, etc. The plaintiff also leased to the defendants other sheep, taking as security therefor several promissory notes secured by mortgages on the sheep. Some of these mortgages did not, in terms, include the increase of the sheep. The notes not being paid, the plaintiff brought suit to foreclose the mortgages. Decree for plaintiff and defendants appealed.]

EAKIN, J.— * * * Plaintiffs contend that the mortgage of 1905 includes the increase of all sheep mentioned therein, on the theory that the offspring of female animals belongs to the owner of the mother. This is true in most states where the chattel mortgage transfers the title to the mortgagee. Northwestern Bank v. Freeman, 171 U. S. 620, 19 Sup. Ct. 36, 43 L. Ed. 307; Jones, Chattel Mtgs. (5th Ed.) 149. With the exception of the state of Texas, we believe that all the courts so holding do so on the theory that the mortgagee holds the title to the mortgaged property. In Texas the mortgage does not transfer the title, but is only a lien upon the property. The court in that state holds that, as between the parties at least, the lien will also include the increase, even when not especially mentioned. Bank v. Mortgage Co., 86 Tex. 636, 26 S. W. 488. But, under the rule that the offspring belongs to the owner of the mother, the increase in Oregon belongs to the mortgagor, unless the increase is also mortgaged, as he is the owner of the mother. This is the holding in Shoobert v. De Motta, 112 Cal. 215, 44 Pac. 487, 53 Am. St. Rep. 207, First Nat. Bank v. Erreca, 116 Cal. 81, 47 Pac. 926, 58 Am. St. Rep. 133, and Battle Creek Bank v. First Nat. Bank, 62 Neb. 825, 88 N. W. 145, 56 L. R. A. 124, where the mortgage is only a lien. In Oregon a chattel mortgage does not transfer the title to the mortgaged property, but is only a lien thereon (Chapman v. State, 5 Or. 432; Knowles v. Herbert, 11 Or. 54, 240, 4 Pac. 126), and unless the mortgage in terms includes the increase it is not subject to the mortgage lien. * * *

Therefore, the decree of the lower court is affirmed.[2] [The court affirmed the decree of the lower court because of certain covenants in the lease.]

POSSESSION—PERMITTING MORTGAGOR TO SELL IN USUAL COURSE OF TRADE.

ROBINSON et al. v. ELLIOTT.

89 U. S. (22 Wall) 573, 22 L. Ed. 758. 1875.

The facts are stated in the opinion.

MR. JUSTICE DAVIS.—This is an appeal from a decree of the Circuit Court for the District of Indiana, dismissing a bill in chancery filed by the appellants.

The bill makes substantially this case: John T. and Seth A. Coolidge were partners in the retail dry goods trade in Evansville, Indiana, from 1863 to the 7th of August, 1873, when one of the partners died. During the greater part of this time Andrew L. Robinson, one of the complainants, was the accommodation indorser for the firm to the first National Bank of Evansville, from whom they obtained loans of money at different times as their convenience required, and Julia R. Sloan, the other complainant, also loaned them money as they needed it. The money thus borrowed was put into the business of the firm, and became part of their capital stock.

The indebtedness to the bank on the 7th of July, 1871, was $7,600, and to Mrs. Sloan $3,174. On this day the partners executed a mortgage to the appellants, on their store of goods, furniture and fixtures. The mortgage, after reciting the liability of the firm to the appellant, Robinson, on the notes indorsed by him, seven in number, all maturing between the 25th of July and the 6th of October of the same year, states that it is contemplated that in order to take up said several notes or some of them, it may become necessary to renew the same or discount other notes, to enable the said mortgagors to take up said notes, or raise money therefor. The recital of the indebtedness to the appellant, Mrs. Sloan, by note at four months with interest, is also made, with the statement that, if not convenient to pay it at maturity, it may be renewed from time to time as the parties may agree.

After these recitals and a mutual understanding of the parties, concerning the continuance of the indebtedness, the property is conveyed upon the express agreement that until default be made

[2] See Childs' Personal Property, § 195.

in the payment of some one of said notes, or some paper in renewal thereof, the mortgagors may remain in possession of the goods and sell them as heretofore, and supply their places with other goods, and the goods substituted by purchase for those sold shall, upon being put into the store now occupied by them, or any other in Evansville in which they may be put for sale, be subject to the lien of the mortgage. * * *

The mortgagors remained in possession of the property, and bought and sold as they had been accustomed to do, from the 7th of July, 1871, to August 7, 1873, when Seth A. Coolidge died. During this interval of twenty-five months, the interest and less than $100 of the principal of Mrs. Sloan's debt was paid, and the interest and about one third of the principal of the bank debt. The note of Mrs. Sloan's was not renewed, but was past due about twenty-one months. Robinson continued to indorse for the firm. Immediately after the death of Seth A. Coolidge the property of the firm, consisting of the old stock, goods subsequently purchased, and debts due the firm, was inventoried and appraised, and found to be very little in excess of the debts owing by the firm. This inventory and appraisement was completed on September 15, and the following day the appellants seized the goods, but were prevented from selling them on account of proceedings in bankruptcy having been commenced against the surviving partner, who was adjudged a bankrupt on the 4th day of October.

On the 15th of November the defendant was appointed assignee, and demanded the goods from the appellants, who refused to deliver them.

The bill concludes with a prayer that an account may be taken of what is due the appellants, and for a sale of the goods.

The circuit court sustained a demurrer to the bill, and rendered a decree dismissing it, which are the errors complained of.

There are few subjects which have been more discussed in the courts of this country, with less uniformity of decision than that of sales and mortgages of personal goods, without delivery of possession. In Indiana the Statute of 13th Elizabeth has been adopted, and two provisions applicable to this case engrafted on it. The first declares that "No assignment of goods by way of mortgage shall be valid against any other person than the parties thereto, when such goods are not delivered to the mortgagee, or assignee, and retained by him, unless such assignment or mortgage shall be duly recorded." And the second says, "That the question of fraudulent intent in all cases shall be deemed a question of fact."

Prior to the incorporation of these provisions in the statute it

was necessary to the validity of chattel mortgages in Indiana that there should be manual delivery of the mortgaged property to the mortgagee who should continue to hold the same in his possession. These provisions changed the law in this particular, and permitted the retention of the possession of personal property by the mortgagor in a chattel mortgage given as security for the payment of debts. And there can be no question that in Indiana a mortgage, which simply allows the mortgagor to retain the possession and use of the property until breach of the condition is, when duly recorded, prima facie valid. But it is insisted that the effect of these provisions is also to make a mortgage of a stock of goods, containing a provision authorizing the mortgagor to retain possession for the purpose of selling in the usual course of trade, prima facie valid, and that the court cannot, as a matter of law, pronounce it fraudulent. This, we think, is going beyond what the legislature intended. If registration was intended, as we think it was, as a substitute for delivery of possession, it was not meant to be a protection for all the other stipulations contained in a mortgage. If so, it could be used as a cover for any fraudulent transaction, which would have to be treated, on the theory advanced, as valid, until the contrary was shown.

It is true the law conferred on the parties the right to agree that the possession of the property could remain with the mortgagor, provided the mortgage be recorded; but if the mortgage contains other provisions, which, on legal principles, vitiate the whole instrument, it is difficult to see how recording it could make it even prima facie valid. * * *

There is, therefore, nothing in the way of the consideration of the main question involved in this controversy on its merits.

If chattel mortgages were formerly, in most of the states, treated as invalid unless actual possession was surrendered to the mortgagee, it is not so now, for modern legislation has, as a general thing (the cases to the contrary being exceptional), conceded the right to the mortgagor to retain possession, if the transaction is on good consideration and *bona fide*. This concession is in obedience to the wants of trade, which deem it beneficial to the community that the owners of personal property should be able to make *bona fide* mortgages of it, to secure creditors, without any actual change of possession.

But the creditor must take care in making his contract that it does not contain provisions of no advantage to him, but which benefit the debtor, and were designed to do so, and are injurious to other creditors. The law will not sanction a proceeding of this

kind. It will not allow the creditor to make use of his debt for any other purpose than his own indemnity. If he goes beyond this, and puts into the contract stipulations which have the effect to shield the property of his debtor, so that creditors are delayed in the collection of their debts, a court of equity will not lend its aid to enforce the contract These principles are not disputed, but the courts of the country are not agreed in their application to mortgages, with somewhat analogous provisions to the one under consideration. The cases cannot be reconciled by any process of reasoning, or on any principle of law. As the question has never before been presented to this court, we are at liberty to adopt that rule on the subject which seems to us the safest and wisest. It is not difficult to see that the mere retention and use of personal property until default is altogether a different thing from the retention of possession accompanied with a power to dispose of it for the benefit of the mortgagor alone. The former is permitted by the laws of Indiana, is consistent with the idea of security, and may be for the accommodation of the mortgagee; but the latter is inconsistent with the nature and character of a mortgage, is no protection to the mortgagee, and of itself furnishes a pretty effectual shield to a dishonest debtor. We are not prepared to say that a mortgage under the Indiana Statute would not be sustained which allows a stock of goods to be retained by the mortgagor, and sold by him at retail for the express purpose of applying the proceeds to the payment of the mortgage debt. Indeed, it would seem that such an arrangement, if honestly carried out, would be for the mutual advantage of the mortgagee and the unpreferred creditors. But there are features engrafted on this mortgage which are not only to the prejudice of creditors, but which show that other considerations than the security of the mortgagees, or their accommodation even, entered into the contract. Both the possession and right of disposition remain with the mortgagors. They are to deal with the property as their own, sell it at retail, and use the money thus obtained to replenish their stock. There is no covenant to account with the mortgagees, nor any recognition that the property is sold for their benefit. Instead of the mortgage being directed solely to the *bona fide* security of the debts then existing, and their payment at maturity, it is based on the idea that they may be indefinitely prolonged. As long as the bank paper could be renewed, Robinson consented to be bound, and in Mrs. Sloan's case it was not expected that the debt would be paid at maturity, but that it would be renewed from time to time.

as the parties might agree. It is very clear that the instrument was executed on the theory that the business could be carried on as formerly by the continued indorsement of Robinson, and that Mrs. Sloan was indifferent about prompt payment. The correctness of this theory is proved by the subsequent conduct of the parties, for the mortgagees remained in possession of the property, and bought and sold and traded in the manner of retail dry goods merchants, from July 7, 1871, to August 7, 1873. During this period of twenty-five months Robinson indorsed as usual, and Mrs. Sloan was content with the payment of a small portion of the principal of her debt. Instead of getting it renewed, as contemplated by the mortgage, she seems to have been willing to let it remain dishonored, and the fair inference from the averments of the bill is that Robinson would have continued to indorse, and Mrs. Sloan to exhibit the same easy indifference on the subject of her indebtedness, if the death of Seth A. Coolidge had not dissolved the firm and compelled an inventory and appraisement, showing the desperate condition of the mortgagors. It hardly need be said that a mortgage which, by its very terms, authorizes the parties to accomplish such objects is, to say the least of it, constructively fraudulent.

Manifestly it was executed to enable the mortgagors to continue their business and appear to the world as the absolute owners of the goods, and enjoy all the advantages resulting therefrom. * * * There was nothing to put creditors on their guard. On the contrary, this long continued possession and apparent ownership were well calculated to create confidence and disarm suspicion. But apart from this, security was not the leading object. If so, why does Mrs. Sloan's note remain overdue for twenty-one months, and why does Robinson continue to indorse? This conduct is the result of trust and confidence, which as Lord Coke tells us, are ever found to constitute the apparel and cover of fraud.

In truth, the mortgage, if it can be so called, is but an expression of confidence, for there can be no real security where there is no certain lien.

Whatever may have been the motive which actuated the parties to this instrument, it is manifest that the necessary result of what they did do was to allow the mortgagors, under cover of the mortgage, to sell the goods as their own, and appropriate the proceeds to their own purposes; and this, too, for an indefinite length of time. A mortgage which, in its very terms, contemplates such results, besides being no security to the mortgagees, operates in the most

effectual manner to ward off other creditors; and where the instrument on its face shows that the legal effect of it is to delay creditors, the law imputes to it a fraudulent purpose. The views we have taken of this case harmonize with the English common law doctrine, and are sustained by a number of American decisions. In the American editor's note to Twyne's case; Smith, L. Cas., p. 52, n. 7th Am. ed., most of the cases in this country on the subject are collected and classified. See also Mittnacht v. Kelly, 3 Keyes, 407; Yates v. Olmsted, 65 Barb. 43; Barnet v. Fergus, 51 Ill. 352; In re Manly, 2 Bond, 261; In re Kahley, 2 Biss. 383.

* * * Although we have been unable to find any case from Indiana of similar facts with the one at bar, yet the decision in the Ins. Co. v. Wilcoxson, 21 Ind. 355, would seem to imply that when such a case did arise it would be decided in accordance with the views we have presented. The point ruled in that case is that if a mortgage is executed merely to protect property in the hands of the mortgagor from his creditors other than the mortgagee, the mortgagor retaining possession and the right of disposition, and these facts appear upon the face of the mortgage, it would be fraudulent and void as against other creditors, and should be so declared by the court. And the court, to sustain this proposition, refer to Freeman v. Rawson, 5 Ohio 1, a standard authority in this class of cases, for the views we have advanced on this subject.

The decree of the Circuit Court is affirmed.[3]

EPHRAIM v. KELLEHER et al.

4 Wash. 243, 29 Pac. 985, 18 L. R. A. 604. 1892.

The facts are stated in the opinion.

ANDERS, C. J.—From August, 1889, until March 13, 1890, appellant and W. T. Kelleher were partners doing business as retail dry goods merchants in the city of Seattle, in this state, under the firm name and style of W. T. Kelleher & Co. On February 28, 1890, the firm, being indebted, settled with their creditors by paying half of their indebtedness in cash, and giving their firm notes for the balance to Schweitzer & Co., of San Francisco, who represented all of their creditors. There were four of these notes, each for the

[3] See Childs' Personal Property, §§ 200, 204.

sum of $3,133.80, and amounting in the aggregate to $12,534.20. On March 13, 1890, the firm of Kelleher & Co. was dissolved by mutual consent. By the terms of the agreement of dissolution, Ephraim retired from the firm, and Kelleher was to retain all the stock of goods then on hand, and all other firm assets, and promised and agreed to pay all of the copartnership notes and debts, and to save Ephraim harmless from all liability on account thereof. It was also agreed between them that Ephraim should retain the same control of the business that he had before the dissolution until the notes and debts of the firm for which he was liable should be paid; but it appears from the evidence that that part of the agreement was disregarded, and that, in fact, the business was thereafter conducted exclusively by Kelleher. Notice of the dissolution was given by publication in the newspapers and personally to those with whom the firm had formerly dealt, but the firm name of Kelleher & Co. was retained by Kelleher after the dissolution. Ephraim remained in Seattle after the dissolution a greater part of the time, until about July 20 or 25, 1890, at which time he concluded to go to his home in California to remain. Before leaving, however, he entered into an agreement with Kelleher whereby the latter was to give him a chattel mortgage upon the entire stock of goods then in his store in Seattle, and upon the fixtures, and all his book accounts and notes, to indemnify him against his liabilities upon the notes to Schweitzer & Co., then amounting to $9,401.40 (one of the notes having been paid), and upon an indebtedness of Kelleher of $465 to Newhall Sons & Co., and of $300 to the Merced Woolen Mill Company, for which he had agreed to be responsible. The mortgage was executed according to this agreement by Kelleher and wife, on July 28, 1890, and delivered to Ephraim's agent, who caused it to be recorded on August 11, 1890. A day or two subsequent to the recording of the mortgage the respondents Fleischener, Mayer & Co. and Newstadter Bros., respectively, commenced actions against Kelleher in the Superior Court of King County, in which action writs of attachment were issued and placed in the hands of respondent McGraw, who was sheriff of King county, by virtue of which he levied upon and took possession of the property and goods belonging to said Kelleher, and covered by the said mortgage. Appellant, Ephraim, thereupon commenced an action to foreclose his chattel mortgage, and asked to have the same declared to be a lien prior to the attachment liens of the defendants, and prayed for the appointment of a receiver to take charge of and sell the property under the direction of the court. A receiver was accordingly

appointed, who sold the property, and now holds the proceeds subject to the order of the court. As a defense to the action, the attaching defendants alleged in their answer that the morgage was given without consideration, and was executed and delivered by Kelleher for the purpose of hindering, delaying, and defrauding his creditors, and the said defendants, and that the same was fraudulent and void as to the defendants and the creditors of Kelleher. * * * As a conclusion of law from the facts found, the court stated that, as to the assignee and creditors of Kelleher, the mortgage sued on was fraudulent and void, and that the proceeds of the property in the hands of the receiver should be delivered to the assignee as assets under the assignment. The plaintiff excepted to all the conclusions of law stated by the court, except that which stated that the plaintiff was entitled to judgment against the defendants, and moved the court to so change the conclusions of law as to state that the mortgage should be foreclosed as against all of the defendants. The court denied the motion, and the plaintiff duly excepted. Judgment was thereupon entered in accordance with the conclusions of law stated by the court, and the plaintiff appealed to this court.

* * * No provision is made in the instrument for selling the mortgaged goods by the mortgagor, but the proof shows that at the time the mortgage was given it was understood and agreed between the parties that Kelleher should have the right to sell the goods in the usual course of trade, and use part of the proceeds to pay for such new goods as might be required to keep up the stock, and to defray the expenses of conducting the business, and apply the balance in discharge of the obligation set forth in the mortgage.

The controlling question in this case is whether the court below erred in adjudging the mortgage in question fraudulent and void as to the assignee and the creditors of the mortgagor. The instrument is in the usual form of indemnity mortgages. It shows no infirmities upon its face, and was executed in accordance with the provisions of the statute, and apparently for a legitimate purpose; and, if it is to be declared invalid, it must be either by reason of the parol agreement between the parties at the time of its execution, whereby the mortgagor was permitted to appropriate part of the proceeds of the property for the purposes of replenishing the stock and paying the expenses of carrying on the business, or because the mortgage was given and received for the purpose of enabling the mortgagor to defraud his other creditors. The doctrine that fraud may be deduced, as a legal conclusion, from the mere retention by

the mortgagor of the property mortgaged, can have no application under our law of chattel mortgages, for the reason that by our statute the mortgagor is the owner of the property, and, unless he stipulates to the contrary, is entitled to the possession, even after default. The mortgage is a mere lien, by virtue of which no title passes or can pass to the mortgagee, except by foreclosure and sale, in the manner provided by law. This is the plain import of the provisions of chapter 141, and §§ 618, 619, Code 1881 (1 Hill's Code, cc. 1-3, tit. 19), relating to mortgages of personal property; and, the mortgagor in this case having a right to the possession of the mortgaged goods, no presumption of fraud can arise from the fact that he remained in possession until the levy of the writs of attachment. This proposition does not seem to be disputed by the respondents. Nor is it claimed that the mortgage in controversy would have been rendered invalid by an agreement or provision for the sale of the goods by the mortgagor in the ordinary course of trade, provided the proceeds were to be applied exclusively to the payment of the mortgage debt. Such a mortgage was held valid in the case of Langert v. Brown, 3 Wash. T. 102, 13 Pac. Rep. 704, and we feel confident that no court in such a case would now hold the contrary doctrine, unless controlled by statute or bound by prior decisions.

But the respondents contend that the fact that the mortgagee agreed to allow the mortgagor to use part of the proceeds of the sales to purchase additions to the stock, and to pay the running expenses of the business, invalidated the mortgage as to the creditors of Kelleher; and in support of their contention they cite, among others, the case of Wineburgh v. Schaer, 2 Wash. T. 328, 5 Pac. Rep. 299, and that of Byrd v. Forbes, 3 Wash. T. 318, 13 Pac. Rep. 715. In the former case the question of the validity of a chattel mortgage was raised upon a demurrer to the answer which alleged that the mortgagor retained possession of the goods, and sold and disposed of the same in the usual course of business, and applied the proceeds to his own use and benefit, with the knowledge and consent of the mortgagee; and the court held, upon the facts as admitted by the demurrer, that the mortgage was void as to the creditors of the mortgagor. But in so holding the court did not attempt to express its own view as to the rule that should govern in determining the validity of such instruments, but followed the binding decision of the Supreme Court of the United States in the case of Robinson v. Elliott, 22 Wall. 513. In delivering the opinion of the court, Turner, J., said: " * * * It was decided in that case, by the

unanimous voice of the full bench, that a chattel mortgage upon a stock of goods in trade, which permits the mortgagor to remain in possession of the property, and in its disposition by sale in due course of trade, at his discretion, until the maturity of the debt purporting to be secured by it, is fraudulent and void as to other creditors, without reference to the *bona fides* of the parties. We gather from the opinion, however, that the court strongly doubted if the mortgage would be invalid in case the money derived from the sale of the mortgaged property was applied, and was understood to be applied, to the extinction, in whole or in part, of the mortgage debt. This authority must govern us in the decision of this case." But that case can hardly be regarded as an authority in support of the contention of respondents, for the reason that in the case at bar it does not appear that the mortgagor was authorized by the mortgagee to apply the proceeds of the property sold to his own use and benefit. But the case of Byrd v. Forbes, to some extent at least, would seem to support the claim of the respondents, and was probably relied on as authority for the conclusion reached by the learned judge of the superior court in this case. In that case it was stipulated, among other things, in the mortgage, that "until default be made in the payment of any of the said promissory notes, and so long as the mortgagor shall keep up his stock of goods so as to be good and ample security for the payment of the principal and interest of the said promissory notes, that the said mortgagor may and shall have the right to retain possession of the mortgaged property, and sell and dispose of the same in the usual course of his retail business and trade, or in job lots for the sole use and benefit of mortgagee, until the said promissory notes are fully paid, and said mortgage debt is fully paid and satisfied." And the court held that the mortgage was void for indefiniteness, and as being a fraud on creditors of the mortgagor. It was observed by Chief Justice Greene, who delivered the opinion of the court, that the mortgage fell fairly within the principle underlying the case of Robinson v. Elliott, 22 Wall. 513. But it would seem that the decision of the court, in its application of the doctrine of constructive fraud, really went beyond the underlying principle in the case of Robinson v. Elliott; for in the latter case Mr. Justice Davis, speaking for the court, used this language: "But there are features ingrafted on this mortgage which are not only to the prejudice of creditors, but which show that other considerations than the security of the mortgagees, or their accommodation even, entered into the contract. Both the possession and right of

disposition remain with the mortgagors. They are to deal with the property as their own, sell it at retail, and use the money thus obtained to replenish their stock. There is no covenant to account with the mortgagees, nor any recognition that the property is sold for their benefit." It may be reasonably inferred, from the language above quoted, that the court would have sustained the mortgage then before it had the features spoken of not been ingrafted on it; and we do not feel certain that the court would have held the mortgage void in the case of Byrd v. Forbes, on the authority of Robinson v. Elliott, if it had had before it the late case of Etheridge v. Sperry, 139 U. S. 266, 11 Sup. Ct. Rep. 565, in which that case, among others, is reviewed, and its meaning explained. We therefore do not consider the case of Byrd v. Forbes as absolutely settling the law of this state upon the question, and we certainly would not be disposed to extend the doctrine there laid down, even if we should apply it to a like state of facts. * * *

In New v. Sailors, 114 Ind. 407, 16 N. E. Rep. 609, the mortgagor was authorized by the terms of the mortgage to retain the possession of the property mortgaged, with authority to sell at retail, in the ordinary course of trade. There was no agreement that the proceeds should be applied to the liquidation of the mortgage debt, nor anything to show an agreement or understanding that the mortgagor might use the proceeds for his own benefit, and it was held that it could not be judicially inferred that the mortgage was made with fraudulent intent. See, also, Fisher v. Syfers, 109 Ind. 514, 10 N. E. Rep. 306; McFadden v. Fritz, 90 Ind. 590; Morris v. Stern, 80 Ind. 227. And it may be here remarked that these cases hold the contrary doctrine to that supposed to obtain in Indiana at the time the decision in the case of Robinson v. Elliott was rendered; and as the federal courts follow the decisions of the highest courts of the several states in which the actions arise in determining the validity of chattel mortgages, if the same case were again before the Supreme Court of the United States it would in all probability be decided in accordance with the doctrine of the Indiana decisions to which we have referred. See Etheridge v. Sperry, *supra*. In Kansas, mortgages with stipulations like the one before us have, so far as we are aware, been universally sustained, if made in good faith. In Whitson v. Griffis, 39 Kan. 211, 17 Pac. Rep. 801, a case quite parallel with this, a chattel mortgage on a stock of goods containing a provision that the mortgagor might retain possession and sell the property in the course of trade, and account for the proceeds, and receive out of such proceeds the expenses of operating

the business, together with compensation and the means of subsistence of the family of the mortgagor, during the continuance of the business, was upheld and sustained by the court; and the earlier decisions of that court are to the same effect. See Frankhouser v. Ellett, 22 Kan. 127; Howard v. Rohlfing, 36 Kan. 357, 13 Pac. Rep. 566. In Michigan, as in Indiana, the question of fraudulent intent is declared by statute to be a question of fact for the determination of the jury. But the decisions of the supreme court of that state discuss the question quite as much upon principle as with reference to the statute, and we infer from the adjudged cases that the rulings of the court would have been the same had no statute been enacted upon the subject. In the leading case of Oliver v. Eaton, 7 Mich. 108, which was very similar in point of fact to the one now before us, the question of fraudulent chattel mortgages is very exhaustively discussed, and the law applicable to the subject very clearly and forcibly stated. In speaking of what instruments are void upon their face, and why they are so, the court said: "The law, where an instrument contains illegal provisions, and such as are not reconcilable, on any possible hypothesis, with an honest or legal intent, declares it void upon its face, because no evidence could change its character. The cases in which this absolute and unchangeable presumption arises are not numerous. There are other cases in which, upon the face of the instrument, a statutory presumption arises which is only prima facie evidence of fraud; and there are still more cases in which the whole illegality charged must be made out by extrinsic evidence. In both of the classes last named the jury must determine all the facts." And in the same case the court makes this pertinent observation: "By leaving each case to the jury, each instrument is made to stand upon its own actual merits; which is much safer in questions of fraud whose manifestations are infinitely various than the adoption of fixed rules, which must fail to meet numerous cases." See, also, Gay v. Bidwell, 7 Mich. 519, and People v. Bristol, 35 Mich. 28. In Iowa, the same doctrine has been maintained by an unbroken line of decisions for more than a quarter of a century. Torbert v. Hayden, 11 Iowa 435; Hughes v. Cory, 20 Iowa 399; Meyer v. Gage, 65 Iowa 606, 22 N. W. Rep. 892; Meyer v. Evans, 66 Iowa 179, 23 N. W. Rep. 386. * * * In Etheridge v. Sperry, *supra*, the Iowa decisions above cited are referred to, and the doctrine held by them approved. * * * The Supreme Court of Iowa held the mortgage valid, and an appeal was prosecuted to the Supreme Court of the United States. The plaintiff in error relied on the cases of Bank v. Hunt,

11 Wall. 391; Robinson v. Elliott, 22 Wall. 513; and Means v. Dowd, 128 U. S. 273, 9 Sup. Ct. Rep. 65,—all cited by the respondents in this case,—as sustaining his contention that the instruments were invalid in law. And in reference to those cases Mr. Justice Brewer, in delivering the opinion of the court, said: "While there are some points of similarity between each of those cases and this, and while there are observations in the opinions filed in them pertinent and correct with reference to the special facts, which, if disconnected from those facts and applied here, might seem authoritative, yet there are clear and sufficient reasons why neither the decisions nor the opinions should control this case." After referring to the facts appearing in each of those cases, and fully explaining the intent and meaning of the case of Robinson v. Elliott, the court proceeded to say: "In neither of those cases is it affirmed that a chattel mortgage on a stock of goods is necessarily invalidated by the fact that either in the mortgage or by parol agreement between the parties the mortgagor is to retain possession with the right to sell the goods at retail. On the contrary, it is clearly recognized in them that such an instrument is valid, notwithstanding these stipulations, if it appears that the sales were to be for the benefit of the mortgagee. What was meant was that such an instrument should not be used to enable the mortgagor to continue in business as theretofore, with full control of the property and business, and appropriating to himself the benefits thereof, and all the while holding the instrument as a shield against the attacks of unsecured creditors." In determining the question before it the court accepted the law of Iowa upon the subject, as settled by the decisions of the supreme court of that state, as decisive, and accordingly held the mortgages in controversy valid. * * *

While the decisions of the courts of the various states on this subject are irreconcilably in conflict, it seems to us that the rule adopted in the foregoing decisions not only rests on sound principles, but is dictated by wisdom and justice. It is claimed, however, by the learned counsel for respondents, that this mortgage is fraudulent in fact, if not in law. But we have carefully examined all the testimony in the case, and we are not convinced by the evidence that appellant was actuated in accepting this mortgage by any other motive than a desire to secure indemnity from liability upon the debts therein set forth. * * *

From all the facts in this case, we are satisfied that this mortgage was valid between the parties when made, and we are not satisfied that it was rendered invalid by any subsequent conduct of the

parties. We are therefore constrained to conclude that the court erred in holding the instrument void as to respondents. * * * The judgment of the court below is reversed, and the cause remanded, with directions to enter judgment for plaintiff, and against defendant W. T. Kelleher, for said sum of $7,215.98, together with 10 per cent of said sum as attorneys' fees, and for costs, and a decree foreclosing said mortgage lien, and applying the proceeds of said mortgaged property to the satisfaction of said judgment and decree.

HOYT, STILES, SCOTT, and DUNBAR, JJ., concur.[4]

DESCRIPTION.

JOHNSON et al. v. GRISSARD.

51 Ark. 410, 11 S. W. 585, 3 L. R. A. 795. 1889.

The facts are stated in the opinion.

HUGHES, J.—The appellee brought his action in the Faulkner Circuit Court to recover the value of 300 pounds of seed cotton, and 50 bushels of corn, which he alleged he owned, and appellants had converted to their own use in 1884. Appellants answered, denied the ownership of appellee, the conversion by them, and that appellee was damaged. The case was tried by the court sitting as a jury, upon the complaint, answer, and an agreed statement of facts. The court found for appellee, and gave judgment in his favor for $63.40. Appellee claimed the property under a mortgage executed to him by T. B. Lawson, and recorded in that county on the 6th day of December, 1883. The property is described therein as "all my crop of corn, cotton, or other produce that I may raise, or in which I may in any manner have an interest for the year 1884, in Faulkner County, Arkansas," and other property not in controversy in this case. On the trial the appellee offered this

[4] See Childs' Personal Property, §§ 200, 204.

As to validity of chattel mortgage on property not in existence or having only potential existence, see: Rochester Distilling Co. v. Rasey, p. 239; Kellogg v. Lovely, p. 244; Demers v. Graham, p. 247; Holt v. Lucas, p. 252. Also: Deeley et al. v. Dwight et al., 132 N. Y. 59, 30 N. E. 259, 18 L. R. A. 298; Battle Creek Valley Bank v. First National Bank of Madison, 62 Neb. 825, 88 N. W. 145, 56 L. R. A. 125; Hopkins Fine Stock Co. v. Reid, 106 Iowa 78, 75 N. W. 656.

mortgage in evidence. The appellants objected, on the ground that "the description of the mortgaged property is indefinite and uncertain, and, against the claims of third parties, gives no lien to plaintiff." The court considered the mortgage in evidence, and found that Lawson raised a crop of cotton and corn on the land of the defendants, Johnson & Johnson, in Faulkner County, Ark., in 1884; that Lawson paid Johnson & Johnson all the rent due them in 1884; that Grissard's debt due him by Lawson was not paid; that Johnson & Johnson received from and converted to their own use cotton raised by Lawson in Faulkner County, Ark., in 1884, of the value of $41.95, and corn raised by Lawson of the value of $21.46; that they took the cotton and corn sued for here in payment of supplies furnished Lawson, after they had been fully paid all their rent for 1884; that the property so converted was demanded of them by W. H. Grissard before suit, and that they refused to deliver it.

The only question necessary to consider, and the only one made by appellant's counsel here, is, is the description in the mortgage of the property in controversy sufficient? The appellants in the court below asked the court to declare the mortgage was too general, indefinite, and uncertain in the description of the property conveyed; that it created no lien against an innocent purchaser for value, who had no notice of it except constructive notice from its registration; that under the facts admitted the lien of appellants is superior to the lien of the appellee; that the law was against the plaintiff; and that the defendants were entitled to judgment,—all of which were refused by the court. The court, of its own motion, declared "the law to be for the plaintiff, and that his mortgage constitutes a valid lien on the property in controversy, and superior to the claim of the defendants." To the refusal to declare the law as asked by the appellants, and to the declaration of law made by the court on its own motion, the appellants excepted at the time; made a motion for a new trial, which was overruled; and appealed to this court. The description of the property in the mortgage in controversy in the cause is: "All my crop of corn, cotton, or other produce that I may raise, or in which I may have in any manner an interest, for the year 1884, in Faulkner County, Arkansas." The only question raised here is, is the description so general and indefinite as to avoid the mortgage as to third parties? We have not been able to find that the precise question as to the sufficiency of a description so general and indefinite has been determined in this court. Counsel for appellants contends that "a chattel mortgage ought not to be a drag-net, covering a whole county, in

any such general terms," as was said in Muir v. Blake, 11 N. W. Rep. 621, by the Supreme Court of Iowa, in which a description in a mortgage of "all the crops raised by me in any part of Jones county for the term of three years" was held too indefinite and uncertain to charge third persons with notice of the mortgage. While both of these descriptions are very general, it will be noticed that the former is not so uncertain and indefinite as the latter, which was sought to be made to cover crops for three years. In Ellis v. Martin, 60 Ala. 394, which was attachment for rent levied upon three bales of cotton claimed by a third party, and in which an issue was formed to try the right of property in the cotton, the plaintiff offered in evidence a mortgage or lien note, over the objection of the claimant, based on the ground "that the said instrument contained no sufficiently certain description of the property or crop alleged to be covered or described, and could not lawfully be explained by parol evidence." The court overruled the objection, and admitted said deed as evidence, with proof that the cotton was part of the crop raised by said Ellis on said place [named in the mortgage] in 1875. The description was "my entire crop of cotton and corn of the present year," without any other descriptive words. The Supreme Court of Alabama, by Brickell, C. J., said in this case: "The description of the thing conveyed in the mortgage is very general and indefinite, but it is capable of being rendered certain by evidence showing the lands cultivated by the mortgagor in 1875, and the quantity of corn and cotton raised thereon. Generality and indefiniteness of description will not avoid a conveyance." It is uncertainty that will not be removed when the conveyance is read in the light of the circumstances surrounding the parties at the time it was entered into, and their manifest design is considered, that will render a conveyance void. * * * In Varnum v. State, upon indictment for removing mortgaged property (78 Ala. 28), it was held that, when a mortgage conveys the "entire crop" of the mortgagor of every description raised by him, or caused to be raised by him, annually, till a certain debt is paid, the uncertainty as to what the mortgage covers can be removed by parol evidence. In Smith v. Fields, 79 Ala. 335, it was held that a mortgage of "my entire crop of cotton and corn" is not void for indefiniteness and uncertainty, but the descriptive words may be made definite by parol testimony, showing that the parties had reference to the crop to be raised by the mortgagor on the plantation in the county, which he was then cultivating." "The description of the property in the

mortgage, though general, is sufficient to put on inquiry, and the defendant purchasing from the mortgagor was bound to ascertain whether the cotton he bought was the same covered by the mortgage." * * *

The description of the property mortgaged in the case at bar, and in controversy in this cause, "all my crop of corn and cotton for the year 1884, in Faulkner county, Arkansas," is not so indefinite and uncertain that it could not be made certain by extrinsic evidence. The record of the mortgage was constructive notice, and all persons purchasing any of the crop of the mortgagor in the county of Faulkner, for the year 1884, were bound to inquire whether it was covered by the mortgage to Grissard.

Affirmed.[5]

WILLEY v. SNYDER.

34 Mich. 59. 1876.

The facts are stated in the opinion.

COOLEY, CH. J.—An able and ingenious argument was made in this case to convince us that a description of property in a chattel mortgage as "One Durm bull, known as the Grinnalls bull,—said bull is four years old and weighs about 2,400 pounds," was so vague and indefinite as to prevent the mortgage, when duly filed, becoming constructive notice to a subsequent purchaser of the bull from the mortgagor. The position of the plaintiff is perhaps sufficiently shown by the instruction which he requested in the court below; namely, "that the description must be such as would enable a stranger, with the mortgage, to select the property."

It was shown in the case that the mortgagor had but the one bull; that he was called a Durham, and was Durham blood in part, and that he was known as the Grinnalls bull. It would seem that the supposed stranger, with a knowledge of these facts and the mortgage in his hand, could have had no difficulty in selecting the property if he was a man of ordinary intelligence. It ought not to be very difficult to select one when there is only one to select from; especially when certain particulars are mentioned in which the animal would differ from all others in case the number had been greater.

But if a stranger is to be sent out to select property mortgaged,

[5] See Childs' Personal Property, § 201.

with no other means of identification than such as are afforded by the written description, and without being at liberty to supplement that information by such as can be gained in the mortgagor's neighborhood by inquiry of those who know what property the mortgagor was possessed of which would answer the description in the instrument when it was given, and by possessing himself of such other circumstances as persons usually avail themselves of in applying written descriptions to the things intended, it is much to be feared that the stranger would be so often at fault that chattel mortgages, if their validity depended upon his success in identifying the property, would seldom be of much value as securities.

Written descriptions of property are to be interpreted in the light of the facts known to and in the minds of the parties at the time. They are not prepared for strangers, but for those they are to affect; the parties and their privies. A subsequent purchaser or mortgagor is supposed to acquire a knowledge of all the facts, so far as may be needful to his protection, and he purchases in view of that knowledge. If he purchases a bull known in the neighborhood by a particular name, he is chargeable with notice of that fact. A mortgage of the bull by that name, if duly filed, would be as good against him as against the man who gave it. It would be a singular defense to be set up by him to the mortgage, that being a stranger, he discovered no such name on or about the bull, and therefore could not in fairness be bound by a mortgage which undertook to identify the animal by name. Descriptions do not identify of themselves; they only furnish the means of identification. They give us certain marks or characteristics,—perhaps historical data or incidents,—by the aid of which we may single out the thing intended from all others; not by the description alone, but by that explained and applied. Even lands are not identified by description until we place ourselves in the position of the parties by whom the description has been prepared, and read it with the knowledge of the subject matter which they had at the time.

We have been unable to discover that the plaintiff in error was wronged by any rulings in the court below, and the judgment must be affirmed, with costs.

The other Justices concurred.[6]

[6] See Childs' Personal Property, § 201.

DELIVERY.

GARNER v. WRIGHT.

52 Ark. 385, 12 S. W. 785, 6 L. R. A. 715. 1890.

The facts are stated in the opinion.

HEMINGWAY, J.—The appellant, Garner, and one Brown, white men and citizens of the United States, resided in the Indian Territory. On the 19th of January, 1886, Brown there executed a mortgage to Garner, whereby he conveyed to him certain chattels, including the horse and wagon in controversy, as security for a debt. The mortgage provided that Garner should have possession and control of the mortgaged chattels. They were accordingly delivered to him, and remained in his sole possession for more than a month, when Brown borrowed them to use in hauling wood. He used them during 10 days, but at night returned them to Garner's barn. On the 9th of April following, Brown borrowed them to make a trip to Ft. Smith, and after his arrival there they were seized under an attachment against his property. Garner appeared in the attachment suit, and filed an interplea, claiming them under his mortgage. There was judgment against him on the interplea, and he appealed.

In determining the merits of his claim, it is essential to know by what law the validity of the mortgage is to be determined. As a rule, when rights arise in a particular country, they are to be determined by the laws of that country, and the party who would avail himself of them should prove them. The mortgage in controversy was executed in the Indian Territory. No proof was offered of the laws in force there applicable to the matter, but it was agreed between the parties that there was no local Indian law that was pertinent. This absence of proof cannot be supplied by presumption. In similar cases the courts of this state will generally presume the common law to be in force in another state. Cox v. Morrow, 14 Ark. 603; Thorn v. Weatherly, 50 Ark. 243, 7 S. W. Rep. 33. But this presumption is indulged as to those states only that have taken the common law as a basis of their jurisprudence. Such a presumption would not be indulged as to the laws of the state of Louisiana or Texas, because we know that their jurisprudence is founded upon a different system. The same reason forbids such a presumption as to the laws of the Indian Territory, for we know that no system of laws has been adopted there. But property rights are asserted there, and their

existence universally recognized. They do not depend upon the uncertain tenure of possession, but rest upon a more substantial basis. As such rights are respected there, they should be enforced when they become involved in the courts of this state. There is no federal law on the subject. We have no proof of, and can indulge no presumption as to, the local laws in force there. As the parties have invoked the aid of our courts, we must therefore apply our own law, and administer justice according to its principles. Such we understand to be the practice of the Supreme Court of the United States. The Scotland, 105 U. S. 24.

Under our law, if a mortgagee took possession of the mortgaged chattels before any other right or lien attaches, his title under the mortgage is good against everybody, if it was previously valid between the parties, although it be not acknowledged and recorded. The delivery cures all such defects. Jones, Chat. Mortg. § 178, and cases cited; Applewhite v. Mill Co., 49 Ark. 279, 5 S. W. Rep. 292; Cameron v. Marvin, 26 Kan. 625; Hutton v. Arnett, 51 Ill. 198. While the mortgaged chattels are in the custody of the mortgagee, he may lend or hire them, and they continue in his possession constructively; and there is nothing in the relation which he sustains to the mortgagor that forbids to him the offices of ordinary kindness or good neighborhood. Therefore the mortgagee may lend the mortgaged chattels to the mortgagor for occasional temporary use, without prejudice to his security. In a case very similar to this, the Supreme Court of Vermont so ruled. Farnsworth v. Shepard, 6 Vt. 521. The learned judge of the Circuit Court held that appellant's mortgage was void for want of filing and record; but it follows from the principles herein announced that he was mistaken in this. If the transactions of delivery and loan were had *bona fide*, the mortgage should be sustained. The judgment is reversed, and the cause remanded.[7]

FILING.

BROWN v. BRABB.

67 Mich. 17, 34 N. W. 403. 1887.

The facts are stated in the opinion.

CHAMPLIN, J.—Complainant files a bill in Midland circuit setting forth that, January 14, 1884, John J. Ryan and Ethelbert J.

[7] See Childs' Personal Property, § 202.

Brewster, of Midland, were doing business as John J. Ryan & Co.; that on that date they made an assignment to complainant, for the benefit of their creditors, of all of their property and rights not exempt from execution, without preference; that complainant accepted the trust, and qualified as such assignee; that he proceeded to carry out the trust as such assignee; that January 4th, without his knowledge or the knowledge or consent of Brewster, Ryan, in the firm name, gave a chattel mortgage to defendant Brabb for $1,928.67, covering 20 buggies, and with the usual conditions; that the mortgage was given to take up certain notes previously given, and that they never were given up; that the mortgaged property was left in the possession of Ryan & Co.; that when the mortgage was given it was agreed between Ryan and Brabb that the mortgage should be left with the township clerk, with instructions not to file unless some other mortgage on the same property should be presented for filing, and that the clerk was so instructed; that, January 21st, Brabb caused said mortgage to be filed in the township clerk's office; that Brabb demanded the property covered by the mortgage of complainant, which was refused, and that Brabb still claims property in said mortgage; that he claims said mortgage to be void as to him and the creditors of Ryan & Co.; that he believed Brabb would surrender said mortgage, or test its validity, until Brabb informed him that he would not discharge it, but insist upon the lien; that the value is over $100; that he has converted the assets into money; and that he will soon be ready to distribute to the creditors; that Brabb refuses to bring suit, and insists that he shall hold complainant liable for the value of the property converted; that he cannot distribute until the mortgage is canceled; and that Brabb will harass and annoy him by suits to enforce his claim at law. The prayer for relief is to cancel the mortgage, and to restrain defendant from bringing suit, of any name or nature, against complainant, to recover the mortgage debt, and for general relief. December 12, 1885, complainant amended his bill, setting up that the debts of Ryan & Co. were $17,000, and the nominal assets $18,000, and the true value $5,000.

The defendant answers, and admits the copartnership, and denies their insolvency; neither admits nor denies the assignment, but leaves to complainant to proof of the same; * * * The defendant claims the benefit of a demurrer the same as though he had demurred generally and specially.

A general replication was filed, and hearing in open court demanded. The cause was heard April 30, 1886, and a decree made

February 21, 1887, granting the relief prayed for by complainant. Defendant appeals.

The assignee of an insolvent debtor, in the absence of fraud in fact, and in the absence of statute regulations, takes only the debtor's rights; and consequently he is affected with claims, liens, and equities which exist as against the debtor, were he asserting claim to the property. It was long ago held in England that assignees in bankruptcy take subject to whatever equity the bankrupt is liable to. * * * Such is the prevailing doctrine in this country. * * * It is held in this state that the assignee for the benefit of creditors is not a purchaser in good faith. The statute relative to common-law assignments does not place the assignee upon any better footing than the creditors he represents.

There is no question, in this case, but that the chattel mortgage executed by John J. Ryan & Co. was given in good faith, to secure an honest debt, and is valid between the parties. The important question is whether a chattel mortgage not filed pursuant to section 6193, How. St., and valid between the parties, is equally valid and effective as against the assignee for the benefit of creditors who became such prior to the date of the mortgage. In Stewart v. Platt, 101 U. S. 731, 739, the supreme court of the United States, in passing upon this question, say: "Although the chattel mortgages, by reason of the failure to file them in the proper place, were void as against judgment creditors, they are valid and effective as between the mortgagors and the mortgagee. Lane v. Lutz, 40 N. Y. 213; Westcott v. Gunn, 4 Duer, 107; Smith v. Acker, 23 Wend. 653. * * * The assignee can assert, in behalf of the general creditors, no claim to the proceeds of the sale of that property which the bankrupts themselves could not have asserted in a contest exclusively between themselves and their mortgagee." * * *

The assignee is not a creditor, and, as he does not stand in the position of a *bona fide* purchaser, it is difficult to see how he occupies any vantage ground over his grantor, except as he represents the rights of creditors who have become such while the mortgage was kept off from the files. He is merely a trustee to collect and convert the assets, and distribute them among the creditors. * * * But when the unrecorded mortgage is *bona fide*, and made without fraudulent intent, it is valid as against all creditors except those who have become such while it remained unrecorded. The other creditors could not reach it, and consequently this section of the

statute would not empower the assignee to recover the property covered by it.

The difficulty in obtaining a clear perception of the rights of the assignee has arisen in the mistaken view that an unrecorded mortgage is absolutely void as to all creditors. It must be confessed that the language used in many decisions has led to this conclusion. In most cases, however, if not in all, such language has been applied to those cases where the creditors referred to were those who became such while the mortgage was unrecorded. Thus, in Thompson v. Van Vechten, 27 N. Y., at page 582, Chief Justice Denio says: "But it was the apparent, and I think the real object of the act, to prevent the setting up of secret mortgages against persons who might deal with the mortgagor, on the faith that his property was not thus incumbered. It is true, the mortgage cannot be legally questioned until the creditor clothes himself with a judgment and execution, or with some legal process against the property; for creditors cannot interfere with the property of their debtor without process. But, when they present themselves with their process, they may, I think, go back to the origin of their debt, and show, if they can, that, when it was contracted, the incumbrance with which they are now confronted existed, and was kept secret by being withheld from the proper office." This case is cited in brief of counsel as authority to show that an unfiled mortgage is absolutely void. A careful reading of the case would have shown the limitation which, when the facts are disclosed, govern such cases. The distinction was noticed and the principle again stated in Parshall v. Eggert, 54 N. Y. 18, 22. It was there said: "If the instrument under which the plaintiffs claimed were a chattel mortgage, it would be void as against the right of Hunter, the creditor, whom the defendant, the sheriff, represents, inasmuch as the instrument had not been filed when the debt of Hunter was created. For this position the case of Thompson v. Van Vechten, 27 N. Y. 581, is a direct authority. It was there held that the time when the creditor became such fixed the rights of the parties; that a mortgage not then filed was void as to him, although he should not then be in a position to at once attack its validity." The distinction was again clearly made, and the doctrine applied, in the case of Stewart v. Beale, 7 Hun. 405, and affirmed in 68 N. Y. 629, upon the opinions written in 7 Hun. 405.

The case of Wilson v. Esten, 14 R. I. 621, is in many of its features a parallel case to the one under consideration. There,

a mortgage was given in good faith, to secure a loan of money to enable the mortgagor to start in business. It was dated May 5, 1883, but was not recorded. The statute declared "that no mortgage of personal property hereafter made shall be valid against any other person than the parties thereto, unless possession of the mortgaged property be delivered to and retained by the mortgagee, or unless the said mortgage be recorded," etc. On January 14, 1884, the mortgagor executed a voluntary assignment for the benefit of his creditors. The assignee went on and sold the property covered by the mortgage, and paid the money received therefor into the registry of the court, where it was claimed by the general creditors, and also by the mortgagee. The general creditors claimed that the neglect to have the mortgage recorded operated as a fraud upon them, because, in consequence of the neglect, they gave credit to the mortgagor which otherwise they would not have given, and therefore that they were entitled to the fund. The court found, from the testimony, that the neglect to record the mortgage was unintentional, and that the lien of the mortgage was not affected by the failure to place it upon record. * * *

And the court held that, as they had no statute in that state adding to the ordinary powers of a voluntary assignee, the mortgagee was entitled to the money, for the reason that the mortgage was good between the parties, and the assignee occupied no better position than his assignor.

In Shaw v. Glen, 37 N. J. Eq. 32, the firm of James M. Shaw & Co., creditors of John H. Marrin, took from him on October 17, 1882, a chattel mortgage to secure a debt of $375. Marrin resided at Elizabeth, in Union county, but the mortgage was, two days after its date, by mistake, recorded in Essex county, where the goods were, and where they supposed the mortgagor resided. December 28, 1882, Marrin executed a voluntary assignment to defendant, Glenn, for the equal benefit of his creditors, under the assignment act. The assignee at once took possession of the goods then in the mortgagor's hands. Soon after that, the mortgagees discovered their mistake, and recorded their mortgage in Union county. The mortgage was given in good faith in all respects. The suit was brought to foreclose the chattel mortgage. The case is so clearly in point that I feel justified in quoting the opinion of the chancellor. He says: "The defendant, the assignee, insists that the mortgage is void as to him because it was not recorded in Union county, where the mortgagor resided, when it was made, before the assignment to him was delivered. The act provides (P. L.

1881, p. 227) that any mortgage or conveyance intended to operate as a mortgage of goods and chattels, made after the approval of that act, which shall not be accompanied by an immediate delivery, and followed by an actual and continued change of possession of the things mortgaged, shall be absolutely void as against the creditors of the mortgagor, and as against subsequent purchasers and mortgagees in good faith, unless recorded according to the directions of the act, which are that it be recorded in the clerk's or register's office of the county where the mortgagor resides, if he resides in this state, but, if he does not reside in this state, then it is to be recorded in the clerk's or register's office of the county where the property is at the time of executing the mortgage. But the mortgage was clearly valid, as against the mortgagor, when he made the assignment, notwithstanding it had not been recorded according to law (Bank v. Sprague, 20 N. J. Eq. 13), and the assignee took his title to the property subject to the equities to which it was subject in the hands of his assignor. Such is the rule as to assignees in bankruptcy. * * * The same just rule is on every principle obviously applicable to assignees under the assignment act. The failure to record the mortgage does not render it invalid as against the defendant." * * *

Turning now to decided cases in our own state, we observe that many cases are decided merely reciting the language of the statute declaring unfiled chattel mortgages void as to creditors, without stating whether the demands of the creditors existed before or after the date of the mortgage. Such are the cases of Hurd v. Brown, 37 Mich. 484; Haynes v. Leppig, 40 Mich. 602; Cooper v. Brock, 41 Mich. 488, 2 N. W. Rep. 660; Putnam v. Reynolds, 44 Mich. 113, 6 N. W. Rep. 198; Wallen v. Rossman, 45 Mich. 333, 7 N. W. Rep. 901.

Commencing with Feary v. Cummings, 41 Mich. 376, 1 N. W. Rep. 946, which precedes in date some of the cases cited above, the court, on page 382 (1 N. W. Rep. 951), say: "If the mortgage was made to hinder, delay, and defraud creditors, or, inasmuch as the possession was not altered, if it was not put on file prior to plaintiffs becoming creditors, it was invalid as against them; the law being that those who become creditors while the mortgage is not filed are protected, and not merely those who obtain judgments or levy attachments before the filing. Still, no one as a creditor at large can question the mortgage. He can only do that by means of some process or proceeding against the property."

In Waite v. Mathews, 50 Mich. 392, 15 N. W. Rep. 524, the mortgages were filed by mistake in the wrong township. The defendant was a United States marshal, and represented creditors whose debts were older than the mortgages. The chief controversy was upon the validity of the mortgages as against the creditors whom he represented. The court below held that the mortgages were absolutely void, as matter of law, for want of immediate possession. This court said: "The other question was substantially decided in Kohl v. Lynn, 34 Mich. 360, and Fearey v. Cummings, *supra*, where it was distinctly intimated that in order to justify the application of the statute making mortgages, whether honest or not, absolutely void for want of filing or possession, some act must be done, or some detriment sustained, during the interval. As against all such rights, a mortgage without such possession or filing, is absolutely, and not merely presumptively, void; while conveyances not by way of mortgage are only presumptively void, under such circumstances (citing cases). * * * It is to be remembered that filing in the proper office is equivalent, for saving purposes, to actual delivery of property; and this is often delayed by mistake as to the proper office, or by other causes involving no fraud. Rules so stringent as to destroy honest transactions by such omissions must have a reasonable application. The object of the statute is to prevent, and not to facilitate, fraud; and such a construction as was adopted below would not, in our opinion, tend to good. We do not mean to decide that creditors who have been actually damnified by reliance on a title being clear to postpone action may not be protected."

In Crippen v. Jacobson, 56 Mich. 386, 23 N. W. Rep. 56, the mortgage was dated May 9, 1884, and purposely not recorded until May 15, 1884, when the mortgagee took possession, and sold the goods mortgaged. He was garnished at the suit of creditors who had become such after the date and before the filing of the mortgage. On page 389, Mr. Justice Campbell, giving the opinion of the court, said: "We have heretofore held that a chattel mortgage, not seasonably filed, is void, and not merely presumptively void, against creditors whose rights intervene between the making and filing. * * * When the debt is not incurred on the credit of an apparently clear title, which is in fact covered by a secret mortgage, the cases cited hold that there is no right to complain of a subsequent mortgage without taking some steps which puts the creditor on a different legal footing than that of a quiescent party. But when a chattel mortgage exists, and is concealed, it is,

under the statute, void, for the reason that it produces a false appearance of entire solvency, when in fact a person known to have mortgaged his stock would not be as likely to get credit as one who had given no such security; and those who deal with such a debtor are liable to be defrauded by appearances. One who gives credit under such circumstances is necessarily exposed to that mischief, and the law has removed all questions of suspicion or notice by making chattel mortgages void, at all events, against creditors who deal with a debtor so situated. Such creditors are directly within the policy of the statute."

The language of the statute contains no qualifications as to the time the creditors become such. It does not say that the unfiled mortgage shall be void as to subsequent creditors, and this has led some courts to hold that it is void as to all creditors. But a qualification is plainly implied from the language of the whole section, considered with reference to the object of the law. It must be remembered that the filing is designed to take the place of the delivery of the property. The object of the law is to protect persons dealing upon credit with one who is in possession of personal property as the ostensible owner, upon the reliance of such ownership, from secret conveyances by which he is enabled to obtain a fictitious credit to which he would not be entitled if the true situation were known. Until such secret conveyance is given, the law has no force. There is nothing for its provisions to operate upon, and the creditor has the protection of the ordinary remedies for the enforcement of his demands. These are not enlarged by the statute, and no new rights or remedies are conferred upon the creditor. To him it makes no difference whether the debtor sells, mortgages, or gives away his property either secretly or openly, unless it is done with intent to defraud him. His remedy to reach the property conveyed depends entirely upon the fraudulent character and intent with which the debtor has conveyed it away. As to him, the debtor may secure another person by delivering the property to him, followed by a continued change of possession; in which case he would not be likely to extend any further credit. But suppose, instead, his debtor gives a mortgage in good faith, to secure an honest debt, to another creditor, or for a present consideration, for a loan of money. There is nothing in the quality of these acts by which he is injured. There is no legal wrong done him. Nor is there any legal wrong done him if the mortgage is kept secret or unfiled, unless he has thereby been led to extend new credit or further time, or been led to abstain from taking

action to collect his debt, in ignorance of the real situation. It would seem unreasonable that without extending any new credit, or otherwise suffering loss, on account of the mortgage being kept from the files, or being filed in a wrong place, he could be permitted to say that the mortgage is void as to him, and that he would attach the property, and deprive the owner of his security, simply because he had failed to comply with the law. He has not been led to do or to omit doing anything, upon the strength of such non-compliance with the statute. And herein lies the difference between his case and the innocent purchaser or incumbrances under the recording laws. These protect subsequent purchasers and incumbrancers in good faith, who have been led to rely upon the record title. To my mind, the reason why the word "subsequent" was not inserted in the statute before the word "creditors" was to meet just that contingency where an existing creditor might suffer injury by relying upon the apparent situation, and so be damnified by postponing action, or extending time of credit already given, or, possibly, in some other manner.

The complainant has not shown that he represents any creditor who is in a position to challenge the validity of defendant's mortgage or claim the benefit of the statute as avoiding it, because of its not having been filed seasonably. We must therefore deny him the relief which he asks. The answer prays affirmative relief, and defendant is entitled to it at our hands. * * *

The decree of the circuit court must be reversed, and a decree entered here in accordance with this opinion. The taxable costs of both parties will be paid by the assignee out of the other funds in his hands.

(The other justices concurred.)[8]

REFILING.

WADE v. STRACHAN.

71 Mich. 459, 39 N. W. 582. 1888.

The facts are stated in the opinion.

CHAMPLIN, J.—On the 3d day of September, 1886, George W. Baldwin, Alida Baldwin, and Leonard J. Baldwin executed a

[8] See Childs' Personal Property, § 203.

As to validity of chattel mortgage when, by statute, such mortgage is required to be recorded, and when such mortgage cannot legally be filed for record until it has been properly acknowledged, see McFadden et al. v. Blocker et al., 2 Ind. Ter. 260; 48 S. W. 1043, 58 L. R. A. 878.

chattel mortgage to Dell Wade to secure a note which was given for a pre-existing indebtedness due on or before September 1, 1887. The mortgage was duly filed on September 4, 1886. The property mortgaged was described therein as follows: "Twenty acres of wheat now sown and growing on the ground, and still to be sown, on the (20) twenty acres, this present season of 1886, on the farm of George W. Baldwin, on section twelve (12), in the township of Orange, Ionia county, Michigan; which said goods, chattels, and property at the date hereof are situate at the farm of George W. Baldwin, in the township of Orange, Ionia county, Michigan." George W. Baldwin, being indebted to John D. Strachan in the sum of $225, on the 22d day of September, 1886, gave to Strachan the joint and several note of himself and L. J. Baldwin, due on or before 10 months after date, and to secure the payment thereof gave to Strachan a chattel mortgage executed by himself and L. J. Baldwin. This mortgage was duly filed. The property mortgaged was described as follows: "Fifty (50) acres of wheat now growing on my farm, situate and being on the south half (½) of the southeast quarter (¼) of section number twelve (12), in township number six (6) north, of range six (6) west, state of Michigan; the same being the farm on which I now reside with my family, and owned by me, in the township of Orange, in the county of Ionia." The whole number of acres of wheat sowed by Baldwin in 1886 was 35. There was a dispute between the testimony of the witnesses as to whether any wheat had been sown at all when the mortgage to the plaintiff was executed; some testifying that none at all had been sown, and others that one day's drilling had been done upon a certain field, which was variously estimated to contain from six to ten acres. The wheat was harvested by Baldwin in summer of 1887, and placed in the barn unthreshed. On September 5, 1887, Wade filed with the township clerk of the proper township the statutory affidavit for renewal of his mortgage. On the 16th day of September, 1887, defendant, claiming under his mortgage, took possession of the wheat in the barn, threshed and sold it, and applied the proceeds as so much paid on his mortgage, the amount realized not being sufficient to pay his mortgage in full. The declaration alleged that defendant converted to his own use the property of the plaintiff; being the wheat grown on the first 20 acres of land sown to wheat by George W. Baldwin on section 12, in the township of Orange, in the fall of 1886. * * * The court submitted it to the jury to find from the testimony whether any wheat had actually

been sown by Mr. Baldwin on the section named in the mortgage at the time it was executed, and he instructed them that if none was sown at that time the plaintiff could not recover, and that in any event he could only recover for the wheat that was actually sown at the time the mortgage was executed, and he excluded from their consideration any wheat sown on the 20 acres after the mortgage was executed. The defendant's counsel submitted the following special question to the jury: "If any wheat was sown before the mortgage was given to Wade, was it more than six acres?" To which the jury answered: "There was more than six acres sown at the time the mortgage was given to Wade." They also found a general verdict for plaintiff.

The defendant insists that the mortgage to plaintiff is void as to him—*First,* because of uncertainty in the description of the property mortgaged; and, *second,* because the affidavit was not filed until after the expiration of a year from the time the mortgage was filed. As above intimated, we think the mortgage indicates by its terms very plainly that it was intended to cover the first 20 acres of wheat which Baldwin should sow on his farm on section 12. * * *

The second objection is based upon the fact that plaintiff's mortgage was not renewed by the filing of the required affidavit within one year from the time the mortgage was filed. The mortgage was filed September 4th, and the renewal was not filed until the 5th of September of the year following. By this omission the defendant claims the mortgage ceased to be valid as against his mortgage, which was given by Baldwin on the 22d day of September, 1886, and was filed the same day. Section 6196, How. St., reads as follows: "Every such mortgage shall cease to be valid, as against the creditors of the person making the same, or subsequent purchasers or mortgagees in good faith, after the expiration of one year from the filing of the same or a copy thereof, unless, within thirty days next preceding the expiration of the year, the mortgagee, his agent or attorney, shall make and annex to the instrument or copy on file as aforesaid an affidavit, setting forth the interest which the mortgagee has, by virtue of said mortgage, in the property therein mentioned, upon which affidavit the township or city clerk shall indorse the time when the same was filed; provided, that such affidavit, being made and filed before any purchase of such mortgaged property shall be made, or other mortgage received or lien obtained thereon in good faith, shall be as valid to continue in effect such mortgage as if the same

were made and filed within the period above named." It is not claimed by defendant that he acquired any lien, or became a purchaser or mortgagee in good faith, after the 4th of September, 1887, which was Sunday, and Monday, the 5th, when the renewal was filed. The effect of the renewal then to him was the same as if the affidavit had been filed within 30 days before the expiration of the year, and, if it had been so filed, it would not be claimed that it had ceased to be valid as against him. It was held in Wetherell v. Spencer, 3 Mich. 123, that a second mortgagee of property, where the first was duly filed at the time the second mortgage was taken, is not a mortgagee in good faith. The court, speaking by Mr. Justice Douglass, said: "Now, the plaintiff was a subsequent mortgagee of the same property; but, having notice of the prior incumbrance, he was not a subsequent mortgagee in good faith, within the meaning of the statute, which was merely designed to protect those who might otherwise be injured by want of notice." The learned judge then refers to the decisions of the court of the state of New York, under a statute which is substantially like our own, and approves of the opinion in Gregory v. Thomas, 20 Wend. 17. Later decisions in that state support the doctrine laid down in the opinion of Lewis v. Palmer, 28 N. Y. 271; Benjamin v. Railroad Co., 54 N. Y. 675; * * *. The language of our statute, referring to subsequent purchasers and mortgagees in good faith, refers to those who become so subsequently to the expiration of the year, and before the renewal affidavit is filed. A person who takes a second mortgage within the year is affected with notice of the mortgage on file; but after the year has expired, and there has been no renewal, a person who then takes a mortgage is not affected by notice created by the filing of the first mortgage. The office and effect of filing as notice expires with the year, and remains so until renewed by filing the affidavit, and then, by force of the proviso as to all persons except those acquiring liens in good faith, or purchasers or mortgagees in good faith in the interim, the lien of the mortgage is presumed with the like force and effect as if filed prior to the expiration of the year. The defendant cites the case of Briggs v. Mette, 42 Mich. 12, 3 N. W. Rep. 231, as supporting the contrary doctrine. From the opinion of Mr. Justice Graves in that case it appears that the court was not entirely unanimous in the views expressed. He says: "The opinion is held by the other members of the court that the reasoning of the New York cases is not apposite or agreeable to the view which has prevailed here, not only with the business pub-

lic, but with the bench and bar." I suggest that the view of the bench is best voiced from the decision above quoted from this court in the case of Wetherell v. Spencer, which had then been the expression of what the law was in this state for nearly 30 years. The case of Wetherell v. Spencer was not referred to in Briggs v. Mette, and, so far as the latter case conflicts with the former, I think the latter case should be overruled. See, also, Manwaring v. Jenison, 61 Mich. 117, 27 N. W. Rep. 899. The judgment must be affirmed.

SHERWOOD, C. J., and MORSE and LONG, J.J., concurred.

CAMPBELL, J.—I agree with all the doctrine of my Brother Champlin, except as to what he says of Briggs v. Mette, which was decided on full consideration, and I think properly decided.[9]

REMOVAL OF CHATTEL TO ANOTHER STATE.

NEWSUM et al. v. HOFFMAN et al.

124 Tenn. 369, 137 S. W. 490. 1911.

The facts are stated in the opinion.

NEIL, J.—The bill states the following facts:

In January, 1910, one C. R. Goza, conveyed to complainant Newsum, trustee for Self & Hawkins, two mules to secure a debt. All of these persons were residents of Quitman county, Miss., and the mules were also there when the trust deed was executed. This instrument provided that the mortgagor should retain possesion of the property until default made. Default was made in the payment of the debt, and after that time Goza, on the 6th day of December, 1910, without the knowledge or consent of the trustee, or of the beneficiaries under the trust deed, conveyed the mules to Memphis, Tenn., and sold them to defendants Hoffman and Wright the next day thereafter. This removal of the property from the state of Mississippi to the state of Tennessee, and the sale by Goza, was, on his part, for the purpose of defrauding Newsum and the aforesaid beneficiaries. The bill does not allege

[9] See Childs' Personal Property, § 208.

that Hoffman and Wright had any actual knowledge of Goza's fraudulent purpose, or of the deed of trust on the mules recorded in Quitman county, Mississippi. The prayer of the bill was for judgment, etc. The defendants demurred, making the point that there was no equity in the bill, because it failed to show that the trust deed was registered in Tennessee, or that the defendants had any notice thereof, and did show that they were innocent purchasers. The chancellor sustained the demurrer and dismissed the bill. On appeal to the Court of Civil Appeals, the decree of the chancellor was affirmed. Thereupon a petition for certiorari was filed in this court, to remove the cause from the Court of Civil Appeals and to have it retried here.

(1) The weight of authority undoubtedly is that when a chattel mortgage is executed in a foreign state, where the property then is, and where the mortgagor resides, and has been duly recorded in that state, pursuant to its laws, and is valid under the laws of that state, the mortgagee, under the rule of comity between states, must be held to have the better right, upon the subsequent removal of the property to another state, as against a levying or attaching creditor of, or an innocent purchaser from, the mortgagor, in such states into which the property has been so removed, although the mortgage is not recorded in the latter state. See notes to Snider v. Yates, 64 L. R. A. 353, and text of the following cases and notes thereto: Shapard v. Hynes, 104 Fed. 449, 45 C. C. A. 271, 52 L. R. A. 675; Nat. Bank of Commerce v. Morris, 114 Mo. 255, 21 S. W. 511, 19 L. R. A. 463, 35 Am. St. Rep. 754; Handley v. Harris, 48 Kan. 606, 29 Pac. 1145, 17 L. R. A. 703, 30 Am. St. Rep. 322; Ord National Bank v. Massey, 48 Kan. 762, 30 Pac. 124, 17 L. R. A. 127; Hornthal v. Burwell, 109 N. C. 10, 13 S. E. 721, 13 L. R. A. 740, 26 Am. St. Rep. 556; Creelman Lumber Co. v. Lesh, 73 Ark. 16, 83 S. W. 320, 3 Am. & Eng. Ann. Cas. 108; Walter C. Jones v. North Pac. Fish & Oil Co., 42 Wash. 332, 84 Pac. 1122, 6 L. R. A. (N. S.) 940, 114 Am. St. Rep. 131. This is true, although the mortgagor is permitted to retain possession until default, under the terms of the mortgage. Many states have spoken upon the question, and, so far as we have been able to discover, the courts of only three of them have rendered adverse decisions—Pennsylvania, Louisiana, and Michigan. In some of the cases referred to it is held that the foreign mortgagee waives his priority in favor of incumbrances put upon the property in the state to which it has been removed, or as to purchases made therein, if he consented to such removal, or having knowledge thereof, did

not, within a reasonable time thereafter, assert his rights. Walter C. Jones v. North Pac. Fish & Oil Co., *supra,* and the following cases cited in the note thereto: Armitage-Hereschell Co. v. Potter, 93 Ill. App. 602; Kanaga v. Taylor, 7 Ohio St. 134, 70 Am. Dec. 62; Anderson v. Doak, 32 N. C. 295; National Bank v. Morris, *supra;* Greene v. Bentley, 52 C. C. A. 60, 114 Fed. 112. See, also, Bank v. Bauman, 87 Neb. 25, 126 N. W. 654. In Creelman Lumber Co. v. Lesh, *supra,* the majority of the court declined to express an opinion on this subject; but Wood, C. J., in concurring with the majority, gave it as his opinion that the fact of consent or nonconsent by the mortgagee should be held immaterial.

(2) We are of the opinion, however, that the point is material, and that the grace of comity should not be extended to cases wherein it appears that the mortgagee consented to the removal, since in such cases he thereby negligently places it within the power of the mortgagor to deceive and defraud innocent people in the state into which the property may be removed. This was one of the grounds on which the court decided the case of Snyder v. Yates, 112 Tenn. 309, 79 S. W. 796, 64 L. R. A. 353, 105 Am. St. Rep. 941. In that case it appeared that the mortgagor had removed the property from Illinois to Tennessee, and entered into business with it as a part of his manufacturing establishment, and that the mortgage had been placed of record in this state, in the county in which the factory or stave mill was located, but not properly acknowledged for registration here. From these facts we inferred that the property had been removed to this state with the consent of the mortgagor. Under these facts the case was correctly decided. However, we think it should be limited to its facts. The view expressed in that case, that while the contract should be governed, as to its validity, by the *lox loci contractus,* it is contrary to sound policy to permit the laws of a foreign state to control in respect of priority of lien or right; that is to say, to permit foreign statutes regulating the filing and registration of chattel mortgages to operate as notice, or to take the place of the common-law rule which requires the mortgagee of chattels to take possession, on pain of suffering a subordination of his rights to creditors of, and innocent purchasers from, the mortgagor, is supported by reasons that are obvious and strong. However, on further consideration, we yield to the great weight of authority on the general question, with the qualification concerning the effect of the consent of the mortgagee above indicated. It seems a churlish and ungracious course, if not an example of

improvident judgment, to hold out against the generous comity of the many states which recognize the rule of interstate courtesy upon this subject. We are the more easily reconciled to our withdrawal from the position taken in the case of Snyder v. Yates, since our present view is in accord with that formerly held by this court, as shown in Hughes v. Abston, 105 Tenn. 70, 58 S. W. 296; Bank v. Hill, Fontaine & Co., 99 Tenn. 42, 41 South. 349; Allen v. Bain, 2 Head 101; Beaumont v. Yeatman, 8 Humph. 542, 548; Gookin v. Graham, 5 Humph. 480; and Galt v. Dibrell, 10 Yerg. 146, 152-155. The last case cited recognizes the distinction above laid down that, if the property be removed to this state with consent of the mortgagor, it becomes subject to our laws and must be registered here. 10 Yerg. 153, 154. To same effect is Gookin v. Graham. Lally v. Holland, 1 Swan 396, has been referred to. We do not think that case is sound, in so far as it holds that a mortgage executed in a foreign state, and duly recorded there, upon a chattel at the time in this state, and continuing in this state, confers a right superior to that of an innocent purchaser of the property by purchase made in this state.

On the grounds stated, the petition for certiorari must be granted, the Court of Civil Appeals reversed, the demurrer overruled, and the cause remanded for answer and further proceedings.[10]

BOYDSON v. GOODRICH.

49 Mich. 65, 12 N. W. 913. 1882.

The facts are stated in the opinion.

GRAVES, C. J.—The plaintiff prosecuted replevin for a pair of horses, a wagon and harness, and the property was taken on the writ and delivered to him. All the material facts were expressly agreed upon and the value of the property with interest from the time of caption on the process was admitted to be $433. The defendant announced his waiver of a return and the court directed a verdict in his favor for that amount. The leading circumstances are as follows:

In May, 1874, the plaintiff and one Benjamin F. Warren were residents of the state of Indiana and of which state the former

[10] See Childs' Personal Property, §§ 203, 207.

has continued to be a resident. The property was at that time owned by Warren and was in Indiana and he mortgaged it there to the plaintiff, but the possession was left unchanged. The plaintiff however caused the mortgage to be recorded according to the laws of that state, and it may be assumed for this case that the effect in Indiana was the same as results here from the filing of a domestic mortgage.

In November following the mortgagor removed the property without the plaintiff's knowledge or consent to this state, and shortly afterwards the defendant met him at Kalamazoo. He had the property with him and was in company with one Augustine. The defendant resided at Big Rapids and was an entire stranger to Warren and his companion. They informed him they wished to sell the property and offered it for $98, although it was worth at least $300 and defendant knew it. The defendant asked them where the property was from, and they told him that they resided at Warsaw in Indiana and had brought the property from that place; that they were both out of money and owed a bill at the American House in Kalamazoo and desired to sell to obtain money to pay the bill and go home. In reply to his inquiry they stated that there was no incumbrance on the property; and in further explanation of their necessities and their willingness to sell at so low a price they said that they started from Warsaw to the lumber woods of North Michigan to obtain work but had been informed that no work was to be obtained there and they were desirous to return home. The defendant then bought the property and paid $98 for it.

Warren is irresponsible.

The plaintiff relies on his mortgage given on the property in Indiana, and the defendant claims under his purchase at Kalamazoo, and the case presents the single question whether the mortgage right is entitled to prevail here over the defendant's purchase. The counsel for plaintiff argues that the rules of state comity are against the defendant and give the foreign transaction preference. But the law seems to be settled otherwise in Montgomery v. Wight, 8 Mich. 143. It is suggested that the point was not there necessary to the decision, and that what is said on the subject is a *dictum*. The case came up on questions reserved, and the point was among them, and was deliberately considered. We regard the ruling as authority. The plaintiff allowed the mortgagor to retain possession and to appear to the world as well authorized to convey an unencumbered title, and no means of information were provided in

this state to impeach this appearance. The defendant met him and publicly bought the property, and he not only had no notice of the plaintiff's mortgage but was expressly told by Warren that no encumbrance existed. He paid a valuable consideration and nothing was wanting to give him the rights of a *bona fide* purchaser. It may be said that the consideration was inadequate, and in one sense that is true. The price was very far below the true value. But the buyer's right in such cases to be protected does not require that he shall have paid the full value. The right to make good bargains is not invaded. It is the making of dishonest ones that the law reprobates. "The question is not whether the consideration is adequate, but whether it be valuable." Bassett v. Nosworthy, 2 Lead. Cas. in Eq. 1.

The facts of the case permitted no other conclusion than that which was reached by the circuit judge, and I think the judgment should be affirmed with costs.

(The other justices concurred.)[11]

FORECLOSURE.

VAN BRUNT v. WAKELEE.

11 Mich. 177. 1863.

[The complainant, Elizabeth Van Brunt, gave a mortgage on a crop of wheat then growing in the field. The mortgage became due on August 1, 1861, and on the day following, the defendant, to whom the mortgage had been assigned, took possession of the wheat, under foreclosure proceedings, but did not remove it from the complainant's premises. At the time this action was commenced, the wheat was stacked on the complainant's premises. Shortly after this action was begun, the complainant tendered the defendant the amount due on the mortgage. The defendant refused to receive it, whereupon the complainant filed a bill to redeem. Judgment for complainant and defendant appealed.]

MARTIN, CH. J.—Without going into any extended discussion of the respective rights of a mortgagor and mortgagee of chattels after foreclosure, it is very clear from all the analogies of the

[11] See Childs' Personal Property, §§ 203, 207.

law, and upon general principles, that a mortgagor has a right to redeem at any time before foreclosure. In the case of a mortgage of chattels this can only be done by a reduction of the property into posssession, or by a sale pursuant to the power contained in the instrument. Neither was done in this case. The assertion of Wakelee that he refused the tender, and that he should take the entire wheat, so long as he did not take it, was no foreclosure; and the offer to pay the debt as alleged in the bill was in season, and discharged the mortgage.

The decree is affirmed, with costs.

The other justices concurred.[12]

LIENS.

Classification.

THE MENOMINIE.

36 Fed. 197. 1888.

The facts are stated in the opinion.

SHIRAS, J.—* * * The steamer Menominie was formerly owned by the Knapp, Stout & Co. Company, a corporation organized under the laws of the state of Wisconsin, but doing business also in the state of Iowa, in which state part of the company's officers resided. The boat was enrolled at Dubuque, Iowa. Subsequently a contract for the sale thereof was entered into between the Knapp, Stout & Co. Company and the Matt Clark Transportation Company, a corporation organized under the laws of the state of Minnesota, and located at the town of Stillwater. By the terms of the contract of sale, which was duly recorded in the office of the surveyor of customs at Dubuque, Iowa, the title remained in the Knapp, Stout & Co. Company until the purchase

[12] See Childs' Personal Property, § 214.

At common law a tender of the mortgage debt on the law day discharged the property from the incumbrance, but the debt remained and its payment might be enforced by an action at law against the mortgagor. In the states where chattel mortgages have been converted into mere liens, it has very generally been held that a tender at any time before foreclosure and sale has the same effect as a tender on law day at common law. Thomas v. Seattle Brewing & Malting Co. et al., 48 Wash. 560, 94 Pac. 116, 15 L. R. A. (N. S.) 1164.

price was fully paid, which has not yet been done, but the possession and full control of the vessel was delivered over to the Matt Clark Transportation Company. The several claims of the seamen, material-men, and others, now in controversy, arose after the delivery of the boat to the transportation company, and while it was engaged in the business of that company. The master finds, under the facts shown in his evidence, that the boat must be deemed to have been the property of the transportation company, and its home port to have been in the state of Minnesota at the time the claims of the several libelants herein arose, and in this finding I concur.

It further appears that supplies were furnished and labor done upon this vessel at its home port, and the question arises whether the creditors have a lien therefor upon the vessel. The labor and material being furnished at the home port, a maritime lien therefor does not arise. The Lottawanna, 21 Wall. 558; The Albany, 4 Dill. 439. If a lien exists, it must be found in the provisions of the state statutes. Chapter 83, Gen. St. Minn. 1878, enacts that "every boat or vessel used in the navigating of the waters of this state is liable—*First*. For all debts contracted by the master, owner, agent, or assignee thereof, on account of supplies furnished for the use of such boat or vessel, on account of work done or service rendered on board or for the benefit of such boat or vessel, or on account of labor done or materials furnished by mechanics, tradesmen, or others in building, repairing, fitting out, furnishing, or equipping the same." * * * In deciding what the statute as originally passed was intended to provide for, we have the right to consider it as the legislature enacted it. It said that it does not create a lien because the statute does not so expressly declare; that is, it does not declare in set phrases that the claims named in the act shall be liens. Liens are, so far as the source of their creation is concerned, divisible into common-law, equitable, maritime, and statutory. Originally, by the common law, a lien consisted merely in the right to retain possession, under certain circumstances, of the property of another, until some debt or charge was paid. Equitable liens did not depend upon possession, nor, strictly speaking, did they constitute a *jus in re* or a *jus ad rem*, but more properly constituted a charge upon the thing. 2 Story, Eq. Jur. § 1215; Peck v. Jenness, 7 How. 612. At common law, though ordinarily the delivery of possession by the one entitled to a lien destroyed or terminated the lien, yet by contract the parties might agree to continue the lien after delivery, or, in other words, might agree

that the property, after delivery, should be subject to be taken and sold if the purchase price or other charge thereon was not paid. Gregory v. Norris, 96 U. S. 619. In equity, the lien consisted in the right to subject the property, even though not in possession of the lienor, to the payment of the debt or claim, as a charge upon the property; and a maritime lien is of like nature in this respect. Thus, in the case of The Rock Island Bridge, 6 Wall. 213, it is said:

"A maritime lien, unlike a lien at common law, may, in many instances, exist without possession of the thing upon which it is asserted, either actual or constructive. It confers, however, upon its holder such a right in the thing that he may subject it to condemnation and sale to satisfy his claim for damages."

Bouvier defines a "lien" to be "a hold or claim which one has upon the property of another as a security for some debt or charge." When, therefore, a statute declares that under certain circumstances a person shall have a lien upon a certain class of property for a debt or charge due, what is meant is that the person shall have the right to hold the property for, or subject it to, the payment of the claim or charge. On the other hand, if the statute declares that the person shall have the right, under the given circumstances, to hold certain property for, or subject it to, the payment of a certain claim or charge, this, in like manner, creates and confers a lien, although the word "lien" may not be used in the statute. It is the right to hold or subject the property to the payment of the claim or debt that constitutes the lien, and the mere words used in the statute are immaterial, so long as the substantial right itself is created. The statute passed by the legislature of Minnesota declares that every boat or vessel used in navigating the waters of this state is liable for the several classes of debts or claims named in the statute, and then provides the method by which the boat may be seized and sold for the payment of the claim or debt. The fact that the legislature did not use the word "lien" in the statute cannot change the fact that the act does and was intended to make the classes of claims therein named charges upon the boat or vessel, and to subject the boat to seizure and sale for the payment thereof; and, this being the very essence of a lien, it follows that the act does create a lien in favor of the classes of claims therein enumerated. * * *

It is further urged that this statute touching the liability of boats and vessels has been abrogated by the subsequent statutes

on the subject of mechanic's liens. Chapter 90, Gen. St. 1878, provides, *inter alia*, that "whoever performs labor or furnishes materials or machinery for erecting, constructing, altering, or repairing any house, mill, manufactory, or other building or appurtenances, or for constructing, altering, or repairing any boat, vessel, or other water-craft, by virtue of a contract with the owner or agent thereof, shall have a lien to secure the payment of the same upon such house, mill, manufactory, or other building and appurtenances, and upon such boat, vessel, or other water-craft," etc. This statute does not expressly repeal the act touching boats and vessels, but it is claimed that it is inconsistent therewith, and therefore repeals it by implication. * * * The mechanic's lien law by its terms includes labor and materials expended in constructing, altering, or repairing boats or vessels, and is therefore mainly, if not wholly, applicable to boats in the process of construction, or when laid up for repairs; or, in other words, when the same are not upon the navigable waters. Furthermore, the mechanic's lien law does not apply to supplies furnished to or labor done in and about the boat in the navigating the same. The one applies to labor done or materials furnished in constructing the boat or refitting it in order that it may undertake the business of navigating the waters of the state, while the other deals with supplies furnished or labor done in connection with the navigation thereof; so that while there may be cases arising in which the labor done or supplies furnished might come within the purview of either statute, this does not show that the legislature intended to abrogate the one act by the enactment of the other. The two statutes deal with the property when in widely different circumstances, and there is no repugnancy or inconsistency between the provisions of the two acts of such a marked character as to justify the conclusion that the latter statute repeals the other. * * *

The first section of chapter 83 of the Statutes of Minnesota being then in force, it follows that persons who have furnished supplies for the use of the boat, or have done work or rendered services on board the same or for the benefit thereof, or have done labor or furnished materials in repairing, fitting out, furnishing, or equipping the same, are entitled to a lien for the sums due them, provided proceedings for the enforcement of the lien have been brought within one year after the cause of action accrued to them,—this being the express limitation found in the statute; and it is applicable to proceedings for the enforcement of such statutory

liens in the United States courts as well as to proceedings in the state courts. * * *

* * * As the ruling herein made on the question of the lien given by the state statute will require a restatement of the accounts, the case will be sent to the master for that purpose.[13]

COMMON-LAW LIEN.

FISHELL v. MORRIS.

57 Conn. 547, 18 Atl. 717, 6 L. R. A. 82. 1889.

The facts are stated in the opinion.

ANDREWS, Ch. J.—The plaintiff brought an action of replevin against the defendant for a horse, a wagon, a harness, a whip and two robes. The trial court rendered judgment that he retain possession of all the chattels but the horse, and that he should return the horse to the possession of the defendant. From that judgment the plaintiff appeals.

The defendant is a livery-stable keeper. One Bohan, of whom the plaintiff bought all of the property, on or about the 17th day of November, 1887, he then being the owner, made a special contract with the defendant to keep and feed the horse for the sum of eighteen dollars a month. Bohan owned the horse up to December 1, 1888. During all that time the defendant continued to keep and feed the horse under the agreement, Bohan calling for, taking, temporarily using and returning the horse at his pleasure, without objection on the part of the defendant on account of arrearages usually due for the keeping of the horse. The plaintiff bought the horse and the other property of Bohan on the said 1st day of December, 1888. Previous to that day Bohan had advertised the property for sale and had requested and urged the plaintiff to buy the same. The defendant had full knowledge of such intended sale by Bohan. On that day Bohan was justly indebted to the defendant in the sum of $48 for the keeping and feeding of the horse. On the morning of that day Bohan took the horse and the other property from the defendant's stable, as he had been accustomed to do, with the knowledge and consent of the defendant (although it did not appear that the defendant had knowledge that Bohan intended to sell the property on that day), and while

[13] See Childs' Personal Property, § 198.

away from the stable again applied to the plaintiff to purchase the same, which the plaintiff did, and took all the chattels into his possession and paid therefor in full. The plaintiff used the horse and wagon in his own business for a short time, and then, at the suggestion of and in company with Bohan, drove to the defendant's stable for the purpose of engaging further keeping for the horse. Bohan introduced the plaintiff to the defendant, informed him that he, Bohan, had sold the horse to the plaintiff, and said he thought the plaintiff would like to board the horse there, and named $20 per month as the price to be paid therefor. The defendant received and stabled the horse. After he had done so he inquired of the plaintiff if he had paid for the horse and the other property. The plaintiff replied that he had paid in full. The defendant then said to the plaintiff that he had a claim of $48 on the horse for its keeping and feeding, and that the plaintiff must govern himself accordingly. The plaintiff said he should want to take the horse out the next day to use, whereupon the defendant said the horse could not be taken from his possession till the claim of $48 was paid. Afterwards on the same day the plaintiff made demand on the defendant to deliver to him the horse and the other articles, which the defendant refused. This suit was then brought. The plaintiff had no knowledge at the time he bought the property that Bohan was indebted to the defendant, and there was no claim that he acted otherwise than in good faith.

The defendant claimed the right to detain the horse in his possession until the debt of $48 was paid, by virtue of his lien thereon for its keeping and feeding. The plaintiff, on the other hand, asked the court to rule that the lien of the defendant on the horse for its keeping and feeding was devested when the horse was taken from his immediate possession, without objection on his part, by the owner of the horse, and by such owner sold and delivered to the plaintiff, an innocent purchaser for value; and that the lien did not revive when the horse was returned to the defendant's stable by the plantiff. The court did not so rule, but rendered judgment for the return of the horse as above stated.

A lien is the right which a creditor has of detaining in his possession the goods of his debtor until the debt is paid. To the common-law idea of a lien it is necessary that the creditor should have the actual possession of the goods over which the lien is claimed, and that the debt should have been incurred in respect to the very goods detained. As possession is the foundation of the common-law lien, any parting with the possession operates as a waiver or

forfeiture of it. "A lien is a mere right to retain possession of a chattel, which right is immediately lost on the possession being parted with." Cockburn, Ch. J., in Donald v. Suckling, L. R. 1 Q. B. 612. See also story on Bailments, § 311; Case of an Hostler, Yelv. 67, note; Pinney v. Wells, 10 Conn. 115.

It is admitted by the defendant's counsel that he would have no right of lien except for the statute. Gen. Stat. § 3047. This statute gives a lien in cases where the common law does not give one. Miller v. Marston, 35 Me. 153; Goodrich v. Willard, 7 Gray 183; Judson v. Etheridge, 1 Cromp. & M. 743; Jackson v. Cummins, 5 Mees. & W. 342; Parsons v. Gingell, 4 C. B. 545.

But there is no intimation in the statute that it uses the word "lien" in any different sense from that which it has in the common law. On the contrary the statute seems to use that word in its precise common-law meaning. It creates a lien in favor of the "keeper"—that is, the one in possession—of animals. It says that the animals, naming the kind, "shall be subject to a lien for the price of such keeping in favor of the person keeping the same until such debt is paid."

This is the exact idea of the common law, the right of a creditor to detain the property of his debtor in his possession till the debt is paid.

In all cases where statutes have created any right of security on the property of a debtor in the nature of a lien, not depending on possession, they have provided carefully for a registration of the transaction.

The contract between Bohan and the defendant, as interpreted by their usage, was such that Bohan had the right to take the horse at any time from the stable for the purpose of using it. The plaintiff claims that a livery-stable keeper who holds a horse at the constant disposal of the owner is the mere servant of the owner and does not have any such possession as would invest him with the right of lien. We do not decide the point. On the finding we must assume that Bohan rightfully took the horse from the defendant's stable and sold it to the plaintiff. This was a transaction which devested the lien. Whatever right the defendant might have had to detain the horse as against Bohan, we are of opinion he had none against the plaintiff.

There is error in the judgment, so far as it directs a return of the horse to the defendant, and for the defendant to recover cost, and this part is reversed.

In this opinion the other Judges concurred.

DRUMMOND CARRIAGE CO. v. MILLS.

54 Neb. 417, 74 N. W. 766, 40 L. R. A. 761. 1898.

Replevin to recover possession of a carriage.
The facts are stated in the opinion.

HARRISON, Ch. J.—This, an action of replevin, was instituted by defendant in error, March 22, 1894, before a justice of the peace in Douglas County, to recover the possession of a "Breton Buggy," and in a trial he was given judgment for the relief demanded. An appeal was perfected to the district court, wherein the defendant in error was again successful. He there obtained judgment against the carriage company, and also against the surety on the appeal undertaking. The carriage company and the surety on the appeal bond present the case to this court for review.

* * * The trial in the district court was without a jury, and on an agreed statement of the facts, as follows: "That W. P. Wilcox was on and prior to July 1, 1891, a physician engaged in the actual practice of his profession in the city of Omaha, Nebraska. That on September 12, 1889, said Wilcox purchased a physician's phaeton or carriage from the defendant, and that from the date of its purchase until on or about the 13th day of May, 1892, the said Dr. Wilcox used the said carriage in his professional business as a physician and surgeon. That on July 1, 1891, said Dr. W. P. Wilcox made, executed, and delivered, for a valuable consideration, being money actually loaned, his certain promissory note to the plaintiff for $350, due one year after date. That no payments have been made on said note, and the same is due. To secure said note, the said Dr. W. P. Wilcox made and delivered a chattel mortgage to plaintiff covering the said physician's phaeton or carriage, a horse, and harness. The said mortgage was filed in the office of the county clerk of Douglas County, Nebraska, in accordance with law, on the 3d day of August, 1891, a copy of which is hereto attached and made a part of this stipulation, marked 'Exhibit A.' The plaintiff was well acquainted with the buggy in controversy, and knew at the time he took the mortgage that it was used by Dr. Wilcox in his business as a physician. * * * The plaintiff was with Dr. Wilcox at the office of the Drummond Carriage Works, defendant, at one time previous to May, 1892, after his mortgage was given, and when Dr. Wilcox ran the buggy in there for repairs, which bill of repairs was paid by Dr. Wilcox. About the 13th of

May, 1892, said Dr. Wilcox took the buggy mentioned in the mortgage, and in controversy herein, to the defendant for repairs; and, pursuant to agreement between the defendant and Dr. Wilcox, the buggy was to be repaired. The bill for the same agreed upon was $60, to be paid in cash when the work was done. * * * The repairs done on the buggy were reasonably necessary for the careful preservation of the carriage. * * * About the 1st of June, 1892, said Dr. W. P. Wilcox left the city of Omaha for Colorado, to be gone an indefinite period of time. * * * During the time of said Wilcox's absence from the city, as aforesaid, the plaintiff supposed the buggy was in the barn of the father of said Wilcox, and did not know different until about the 21st of March, 1894, when he was notified by said Wilcox that the said buggy was in the possession of the defendant. * * * Immediately after said notification, plaintiff demanded possession of said buggy from defendant, and, upon refusal of defendant to deliver up the possession of said buggy to plaintiff, plaintiff commenced this cause of action. The defendant made no inquiries of Wilcox, when he took the buggy to its place of business for repairs, as to whether the buggy was encumbered or not, nor did the said Wilcox say anything about it to the defendant. The buggy has been in the continuous possession of the defendant from the spring of 1892. * * * The defendant, when demand was made on it for the possession of the buggy, refused to deliver the same to the plaintiff until its bill for repairs, as above stated, was paid, and then and there notified the plaintiff that it claimed a lien upon said buggy for the work and labor and material performed and used in repairing said buggy. The value of the buggy was $75 at the commencement of this action. The defendant, and all the officers thereof at the times when said repairs were agreed upon and made, had no actual knowledge of said mortgage, nor were they aware of the existence of such a mortgage until the month of March, 1894."

It is urged by counsel for plaintiff in error that it had a lien, by force of law, on the buggy for the amount of its bill of charges for repairing the buggy, which continued so long as it retained possession of the buggy under a claim of lien for such services. The principle invoked is: If property is delivered to a person, to be by his skill and labor, or by adding thereto property of his, enhanced in value, and he performs the labor or adds his own property to that delivered, and thereby increases the value of the latter, he may retain possession of it until paid for his labor or materials. This is a doctrine of the common law, and the right is usually de-

nominated a "common-law lien," and it exists under a state of facts such as we have just detailed, unless there is a contract inconsistent with such lien, or some modifying circumstances which are in conflict with any such right, or disclose an intent not to claim the right. "A mechanic of any kind has a lien upon all personal property, for manufacture or repairs, while it remains in his possession; * * * a carriage maker, for repairs upon a carriage." See 6 Wait, Act. & Def., p. 149, and cases cited. Persons have by common law the right to detain goods on which they have bestowed labor until the reasonable charges therefor are paid. 2 Kent Com., p. 635. In the absence of specific agreement, if a party has bestowed labor and skill on a chattel bailed to him for such purpose, and thereby improved it, he has by general law a lien on it for the reasonable value of his labor, or the right to retain it until paid for such skill and labor. Bevan v. Waters, 3 Car. & P. 520; Scarfe v. Morgan, 4 Mees. & W. 270; Lord v. Jones, 24 Me. 439, 41 Am. Dec. 391; Grinnell v. Cook, 3 Hill 491, 38 Am. Dec. 663. This right rests on principles of natural equity and commercial necessity. 2 Kent Com., p. 634. No lien exists at common law for the agistment of cattle (Chapman v. Allen, Cro. Car. 271; Jackson v. Cummins, 5 Mees. & W. 342; Wallace v. Woodgate, 1 Car. & P. 575); nor in favor of one to whom a horse has been delivered to be stabled, taken care of, fed, and kept (Judson v. Etheridge, 1 Cromp. & M. 742). In such cases, a lien for the charges will only arise by virtue of a statute or special agreement in the nature of a pledge. * * * The case of an agistment does not fall within that principle, inasmuch as the agister does not confer any additional value on the article, either by the exertion of any skill of his own or indirectly, by means of any instrument in his possession." White v. Smith, 44 N. J. L. 105, 43 Am. Rep. 347; Jackson v. Cummins, 5 Mees. & W. 342.

We refer to the agister's lien for the purposes of directing attention to the fact that it is not a lien which has been recognized as arising by force of the general or common law, or as having any existence at common law, but has its origin in, or is the creature of, statutory provision, and that the reasoning employed and rules announced by this court in reference to agister's liens are not forceful, or applicable herein in regard to the lien claimed. * * * The right to the common law lien would exist in this state unless inconsistent, without statutory law, and we cannot discover wherein it is inconsistent with, or has been abrogated by, statute; hence must determine it in force.

* * * We must conclude that a common law lien existed in favor of the carriage company for the amount due it for the repair of the buggy; and it remains further to determine whether it took precedence of the lien of defendant in error's chattel mortgage. The lien of the mortgage was created and perfected by the filing prescribed by law, long prior to the services, etc., of the carriage company in repairing the buggy, and there is no dispute in regard to the time of attachment of either lien.

* * * The mortgage provided, in terms, that, until default by the mortgagor in the performance of specified conditions or until the happening of certain indicated events, he should keep possession of the mortgaged property, and one of the enumerated events, by the occurrence of which the mortgagee should, at his option, be entitled to take possession thereof, was this: "If the said party of the first part [the mortgagor] shall so negligently or improperly use or care for said property as to subject the same to probable loss or material depreciation of the value thereof,"—from which it seems probable that it was in contemplation of the parties that the mortgagor would, of course, at his own proper cost and charge, have the buggy repaired, if necessary, during the time of its use by him and the existence of the mortgage. * * *

We may now turn to the rules of law which we deem applicable to the state of facts developed in evidence herein. The legal title to the buggy was in the mortgagor. He was the owner thereof; the mortgagee had but a lien thereon. * * * It may be said that a lien which arises by force of the common law may be, under special circumstances, superior to prior existing contractual or statutory liens on the same property. In Darlington, Pers. Prop., p. 48, it is stated on this subject: "And though, in general, a lien cannot be created without authority of the owner, liens for repairs take precedence of prior mortgages, where such repairs were necessary for purposes within the intention of the mortgage, *e. g.*, repairs on vessels or carriages, which the mortgagor was to continue to use." A lien on property, by operation of the common law, may have precedence of an existing mortgage. Jones, Chat. Mortg., § 474; Herman, Chat. Mortg., p. 308. In the case of White v. Smith, 44 N. J. L. 105, 43 Am. Rep. 347, it was said: "Williams v. Allsup, 10 C. B. N. S. 417, is the leading case on this subject. In that case the plaintiff, a shipwright, detained a vessel for his charges for repairs, as against a mortgagee under a prior mortgage. The mortgage had been recorded pursuant to the merchants' shipping act. The vessel was left in the mortgagor's possession and control for

use, and was condemned as unseaworthy. The shipwright's charges were for necessary repairs, made by the mortgagor's direction, without the knowledge of the mortgagee. The court sustained the shipwright's lien for repairs against the claim of the mortgagee. The course of reasoning which led to this result, as expressed in the opinions of the judges, is as follows: Erle, Ch. J., said: 'I put my decision on the ground that the mortgagee, having allowed the mortgagor to continue in the apparent ownership of the vessel, making it a source of profit and a means of earning wherewithal to pay off the mortgage debt, the relation so created by implication entitles the mortgagor to do all that may be necessary to keep her in an efficient state for that purpose. * * * The state of the things, therefore, seems to involve the right of the mortgagor to get the vessel repaired, not on the credit of the mortgagees, but upon the ordinary terms, subject to the shipwright's lien. * * *

We are not holding that in all cases, or generally, the common-law lien will override and be superior to the prior chattel mortgage lien, but that in cases where the mortgagor can be said to have expressed or implied authority from the mortgagee to procure repairs to be made on the mortgaged property it will be so. The carriage company was entitled to its lien, and it was superior to the lien of the chattel mortgage; hence the judgment of the district court was wrong, and must be reversed.

Reversed and remanded.

RAGAN, C., dissents.

STATUTORY LIEN.

ALDINE MANUFACTURING CO. v. PHILLIPS.

118 Mich. 162, 76 N. W. 371, 42 L. R. A. 531. 1898.

The facts are stated in the opinion.

HOOKER, J.—The defendant being a stockholder in the Aldine Manufacturing Company, that company filed the bill in this cause, claiming an indebtedness due to it from the defendant upon open account for $1,000 and upward, and praying an accounting and a decree of foreclosure of its lien upon his stock in default of pay-

ment. The lien is claimed to exist by virtue of § 4161b5, 3 How. Anno. Stat. which provides that the corporation shall at all times have a lien upon all the stock or property of its members invested therein, for all debts due from them to such corporation. The bill was demurred to on two grounds: (1) That there was no jurisdiction in equity to enforce the lien; (2) that the remedy provided by 3 How. Anno. Stat. §§ 4161c3-4161c7, inclusive, is exclusive. The demurrer was sustained, and the bill dismissed. The complainant has appealed.

Upon the part of defendant it is claimed that equity has no jurisdiction to enforce a sale of the property to satisfy the statutory lien in a proceeding brought solely for that purpose; * * * The theory upon which the bill seems to have been filed is that the lien of the complainant was akin to that of a mortgage or pledge of the stock, and carried with it a right to enforce payment of the debt secured by it, through foreclosure, in a court of chancery, as well as by the notice and sale provided for by the statute to which allusion has been made. This lien is not one which is created by direct agreement of the parties, such as a pledge or a mortgage, but arises by operation of law out of certain business relations, viz., that of corporation and stockholder. It is not in its nature an equitable lien, like the lien of a vendor of land sold upon contract for the purchase price. In such cases, under our practice, courts of equity have power to enforce the lien, upon bill practically for specific performance, to which the enforcement of the decree for the purchase price, by sale of the premises, is an incident. * * * It is, on the contrary, a legal security, closely analogous to a common-law lien, which last is said not to be enforceable in equity. Indeed, in cases of common-law liens, which always involve possession of the chattel, actual or constructive (2 Kent, 12th ed. 639), the creditor had no right to sell the chattel for the purpose of obtaining compensation. The lien was defined to be "the right of detention, which artisans and others who have bestowed labor upon an article, or done some act in reference to it, * * * had, in some instances, of a right of detention thereof till reimbursed for their expenditures and labor." * * * As said by Chancellor Kent: "A lien is in many cases like a distress at common law, and gives the party detaining the chattel the right to hold it as a pledge or security for the debt, but not to sell it. * * * See also Jones, Liens, § 335, where the author, in discussing a carrier's lien, says that it, "like all other common-law liens founded upon possession, gives him (the holder) no right

to sell the property, but only a right to retain it until his charges are paid." Again, in § 1033 the learned author says that "a common-law lien * * * is merely the right of a person in possession of the property of another to detain it until certain demands * * * are satisfied."

In Doane v. Russell, 3 Gray 382, a wagon maker sold a wagon, pursuant to notice to the owner, for the purpose of satisfying his lien, and the court held that he had no right to do so. In Briggs v. Boston & L. R. Co., 6 Allen 246, 83 Am. Dec. 626, a railroad company sold flour to pay their charges for its transportation, and it was held that they had "only a right to detain it until they were paid, and not to sell it to obtain remuneration to which they were entitled." In Pothonier v. Dawson, Holt, N. P. 383, Chief Justice Gibbs said: "Undoubtedly as a general proposition, a right of lien gives no right to sell the goods." This was *obiter,* but nevertheless, from the eminence of the author it is entitled to great weight. The doctrine was stated in Jones v. Pearle, 1 Strange 557. Again, in Lickbarrow v. Mason, 6 East 21, note, the rule was stated by Mr. Justice Buller as follows: "But he who has a lien only on goods has no right so to do (i. e. sell and dispose of them); he can only retain them till the original price be paid." * * * In Briggs v. Boston & L. R. Co., 6 Allen 246, 83 Am. Dec. 626, Merrick, J., said: "And the rule, which is now well established, that a party having a lien only, without a power of sale superadded by special agreement, cannot lawfully sell the chattel for his reimbursement, is as applicable to carriers as to all other persons having the like claim upon property in their possession." While the doctrine of these cases—i. e. that the creditor cannot sell the property—is indisputable, there was no impediment to the recovery of judgment and sale of the property, as well as any other property of the debtor on execution. * * *

Does it follow that a common-law lien cannot be foreclosed in equity because it does not confer upon the creditor the right to sell the property? It is evident that, in cases of common-law lien for a liquidated claim, a judgment and execution are as expeditious and effective as a proceeding in equity would be likely to be, and an application of the familiar doctrine that equity will not intervene when there is an adequate remedy at law would seem proper. It is a significant fact that we are not cited to any well-settled line of authorities that support the practice of foreclosing common-law liens in equity. At the same time, Chancellor Kent, in discussing the subject, says: "I presume that satisfaction of a lien

may be enforced by a bill in chancery." 2 Kent, Com. 12th ed. p. 642. He supports the statement by no authorities, however. And in Tete v. Farmers' & M. Bank, 4 Brewst. (Pa.) 308, there is a *dictum* that in proper cases the creditor may invoke the aid of a court of equity to work out a sale. The lien with which we have to do, is not a common-law lien, but is statutory. It has the attributes of a common-law lien, however, although the manual possession of the certificates of stock is not with the complainant. Inasmuch as a transfer of the stock must be upon the books, it may be urged that the corporation has constructive possession. But it is not of much importance whether it has possession or not. Statutory lines often exist, although the creditor has not possession of the property; and we know of no authority that treats the matter of possession as depriving statutory liens of the legal attributes of common-law liens to which they are analogous. 1 Jones, Liens, § 104, says that "a statutory lien without possession may, by force of the statute, have the same operation and efficacy that a common-law lien has with possession." * * *

In the case of Southern Michigan Cedar & Lumber Co. v. McDonald, 57 Mich. 292, Cooley, Ch. J., said that log "labor liens (which are statutory) could give no jurisdiction to a court of equity. * * * If valid, they were legal claims." * * * See South Fork Canal Co. v. Gordon, 6 Wall. 561, 18 L. Ed. 894, where the Federal Supreme Court held that the jurisdiction to enforce a statutory lien "rested on the statute, and could extend no further." In 23 Am. & Eng. Enc. Law, p. 697, it is said: "The lien is most frequently enforced by the refusal of the corporation to register transfers from an indebted member;" citing many cases. It adds that other methods of enforcement are foreclosure and sale and attachment. Few authorities are cited, and these will be discussed later. * * * But, when we search for cases where statutory or common-law liens have been foreclosed in equity upon bills filed for the purpose, we find few, though it is probable that the states of Alabama, Kentucky, Illinois, and Maryland would sustain the practice. In Westmoreland v. Foster, 60 Ala. 448, a bill was filed against a tenant to enforce a lien for rent, against cotton in the hands of a vendor of the tenant. It was there held that a statutory lien, which is an incident of some contract made, is enforceable by the common processes of the law. This case proceeded upon the theory of a trust. * * * In Kenton Ins. Co. v. Bowman, 84 Ky. 430, a suit was brought to foreclose a mortgage on the property of the wife of Shinkel to the complainant. Shinkel

held stock in the complainant company, and by an amended petition the complainant claimed a lien on that stock to secure this mortgage debt, or any part which should remain unsatisfied by the foreclosure of the mortgage. A decree of foreclosure was granted. * * * In National Bank of the Republic v. Rochester Tumbler Co. 172 Pa. 614, a bill was filed to compel a transfer of stock to a pledgee. The tumbler company filed a cross bill to enforce its lien, which was sustained, and the stock was sold to satisfy it. In case of Farmers' Bank of Maryland's Case, 2 Bland, Ch. 394, an executor filed a bill to compel the bank to apply stock dividends upon indebtedness due the bank from the intestate, and to sell the stock, and apply the proceeds, and that only the deficiency after such application of dividends and sale of stock should be admitted as a claim against the estate. It will be seen from the foregoing that in nearly all of these cases jurisdiction might have been sustained upon other grounds than that of foreclosure, and that the court might therefore, in order to do justice between the parties, have allowed a sale of the stock. * * * It is manifest that there is confusion in the law upon this subject. If it is true that equity has jurisdiction to enforce payment by foreclosure in all cases of statutory liens, it must be because of a difference between them and common-law liens, which we have not been able to discover, or because of the force to be accorded to authorities comparatively modern, few of which are cases of foreclosure merely. If that is the rule, it will be hard to distinguish the present case from any other lien for labor, carriage, or storage. The log lien, which has been discussed, would be no exception; for, if chancery has a general jurisdiction to enforce liens, it is not lost by the addition of a statutory method of relief. Authorities are numerous in support of this proposition. So that, to our mind, the authorities, if there are such, that hold the statutory remedies are exclusive, recognize the want of jurisdiction in equity. We are of the opinion that resort to equity is neither necessary nor permissible in the majority of lien cases, and that the courts of law can deal with them cheaply and expeditiously. On the other hand, we have no doubt that equity, having jurisdiction for other purposes, may order sales of property, for the satisfaction of liens, as was done in our own case already cited.

It is contended that such jurisdiction is shown by the bill in this case, but we think not. It seems to be a foreclosure bill simply. * * * We see no opportunity for a multiplicity of suits,

and the bill does not show that for any reason the remedy by judgment and execution is not adequate.

We must affirm the decree, with costs.

MONTGOMERY, J., did not sit. The other Justices concur.

RIGHT OF PRIORITY IN LIENS.

SULLIVAN v. CLIFTON.

55 N. Jer. Law 324, 26 Atl. 964, 20 L. R. A. 719. 1893.

Action for the possession of a horse.

The facts are stated in the opinion.

VAN SYCKEL, J.—On the 2d of October, 1891, one Amos Wells executed to Sullivan, the plaintiff, a chattel mortgage on a horse owned by Wells. The mortgage was immediately placed on record, the mortgagor retaining possession of the horse. After the mortgage had been lodged for record, the mortgagor, without the knowledge of Sullivan, left the horse at the livery stable of the defendant, Clifton, to be boarded and kept. The only question in the case is whether the lien of the chattel mortgage is superior to the statutory lien of the livery stable keeper. Our statute reads as follows: "That all livery stable, boarding, and exchange stable keepers shall have a lien on all horses and other animals left with them in livery for board or sale or exchange and also upon all carriages, wagons, sleighs, and harness left with them for storage, sale, or exchange, for the amount of the bill due to the proprietor of any such stable for the board and keep of any such horse or other animal, and also for such storage; and shall have the right, without the process of law, to retain the same, until the amount of such said indebtedness is discharged." The courts of Tennessee, New Hampshire, Vermont, and Massachusetts hold that the mortgagee is entitled to priority. * * * I have found but two cases holding otherwise: Smith v. Stevens, 36 Minn. 303, 31 N. W. Rep. 55; Case v. Allen, 21 Kan. 217. In the former case the statute gave the liveryman a lien for keep of horses at the request either of the owner or lawful possessor thereof, and provided that he might retain the animals until his charges were paid.

Under that statute no other view could reasonably be taken. In the Kansas case, Justice Brewer, in support of his view, giving preference to the statutory lien, cites the English cases giving a lien for the repairs of vessels made at the instance of the mortgagor priority over a previous mortgage executed by him. This preference rests not upon statute, but upon a rule of the commercial law which does not dominate this case. The English courts base the superior right of one who repairs a vessel upon this ground, viz.: that, the mortgagee having allowed the mortgagor to continue in the apparent full ownership of the vessel, there arises an implication that the mortgagee has authorized him to make repairs which give an additional value to the vessel, and keep it in an efficient condition for service. Williams v. Allsup, 100 E. C. L. 416. They hold, however, that the case of an agistment does not fall within the same principle, inasmuch as the agister does not confer any additional value on the animal; he simply takes the animal to feed it. Jackson v. Cummins, 5 Mees. & W. 342; Wallace v. Woodgate, 1 Car. & P. 575. The cases are cited and discussed by Mr. Justice Depue in White v. Smith, 44 N. J. Law 105, and this distinction is adverted to in that case. Hence it was that the agister of cattle, not being within the reason of the rule upon which the lien for the repairs of vessels was based, was not entitled at common law to the like protection. Nor is the liveryman within the reason of the rule which applies to innkeepers. An innkeeper is bound to entertain his guest, but even he at common law acquires no lien on the goods which his guest brings with him, if he knows that the guest is unlawfully in possession of them. A liveryman is not bound to receive a horse on keep. In this case he had notice of the mortgage, and could have declined to take the horse, unless he was willing that his lien under the statute should be subject to the mortgage. The lien of the liveryman as well as that of the mortgage resting exclusively upon statutory provisions, the one having no higher claim to be enforced than the other, the lien of the former, being subsequent in time, and taken with full notice of the right of the latter, must, upon principle, be subject to it. The maxim "*prior est in tempore, potior est in jure*" applies. It is one of the characteristics of common-law liens which arise upon considerations of justice and policy, by operation of law, as distinguished from liens created by contract or statute, that the former, as a general rule, attach to the property itself without any reference to ownership, and override all other rights in the property, while the latter are subordinate to all prior existing

rights therein. In my opinion, the mortgage must prevail over the contesting lien, and the judgment below should be reversed.[1]

PARTING WITH POSSESSION.

SUSENBRENNER v. MATHEWS et al.

48 Wis. 250, 3 N. W. 599. 1879.

The facts are stated in the opinion.

RYAN, C. J.—The shops of the appellant, Schweitzer and Maxwell, although in the same building, were held by them respectively in severalty; and the right of way of Maxwell, although passing through the shops of the appellant or Schweitzer, was part of his building and used by him of his own right.

The buggy belonging to Maxwell was delivered to him through the right of way by the appellant, after it had been ironed by the latter. It was delivered with the expectation that it should be painted by Maxwell; but Maxwell owed no duty, either to Schweitzer or the appellant, to paint it. The delivery was unconditional, and the buggy must be taken to have been delivered to Maxwell in his right as owner of it.

This delivery operated as an absolute waiver of all lien of the appellant for ironing the buggy. The essence of lien, in such cases, is possession. Lien cannot survive possession; and except in case of fraud, and perhaps mistake, such a lien cannot be restored by resumption of possession. "Lien is a right to hold possession of another's property for the satisfaction of some charge attached to it. The essence of the right is possession, and whether that possession be of officers of the law or of the person who claims the right of lien, the chattel on which the lien attaches is equally regarded as in the custody of the law. Lien is neither a *jus ad rem* nor a *jus in re,* but a simple right of retainer." 3 Parsons' Cont. 234.

The voluntary parting with the possession of the goods will amount to a waiver or surrender of a lien; for, as it is a right founded upon possession, it must ordinarily cease when the possession ceases." Story's Ag. § 367.

[1] See note to Shaw v. Webb, p. 355.

As this disposes of the lien set up by the appellant to support this action, it is immaterial how the respondents came into possession. In replevin, a plaintiff recovers on his own right of possession, not on the weakness of the defendant's right.

The judgment of the court below is affirmed.[14]

MECHANIC'S LIEN.

Definition—Nature of.

MOCHON v. SULLIVAN et al.

1 Montana 470. 1871.

The facts are stated in the opinion.

MURPHY, J.—This suit was brought to foreclose a mechanic's lien against certain property described in the complaint of the defendant Sullivan under an act of the territorial legislature, entitled "An act securing liens to mechanics and others," approved December 30, 1864, and was tried and determined in conformity with the provisions thereof. * * *

The cause was tried by the court, a jury being named, and upon the pleadings, proofs, and findings, a judgment was rendered in favor of the plaintiff against the defendant Sullivan. * * *

The only matters that are necessary for us to consider here are the character of the action and the nature of the judgment, decree, or final order to be entered.

And these questions involve, to some extent, the construction of the statute referred to.

The mechanic's lien is derived from the principle of the lien on personal property at common law, and is based upon statutory enactment in the different states and territories.

It is remedial in its character, rests upon the broad foundation of natural equity and commercial necessity.

It is not a common-law right, but simply a creature of the statute, and differs in some respects from all other liens known to the law.

[14] The holder of a lien may allow the owner of the property to take it into his possession and remove it without prejudice to the lien, if so agreed. De Witt v. Prescott, 51 Mich. 298, 16 N. W. 656.

Under the common law, a lien only exists while the party continues in possession of the property upon which he has bestowed his labor, for by parting with possession he shows that he thereafter trusts to the personal credit of his debtor.

But to the validity of this lien no possession is necessary, for it is a charge upon the property in the hands of the owner, and when it once attaches, it relates back to and takes effect from the commencement of the labor or appropriation.

It continues, without either form or notice, for a certain period according to the statute, and then is kept alive by the act of the party and judicial process.

It is not a general, but a particular lien, and is in its nature peculiar and of an equitable character.

The doctrine upon which it is founded is upon the consideration of natural justice, that the party who has enhanced the value of property, by incorporating therein his labor or materials, shall have a preferred claim on said property for the value of said labor or materials.

The foundation of the suit to enforce it arises only by virtue of an express or implied contract with the owner, and the proceedings to some extent resemble and are somewhat in the nature of proceedings *in rem*.

The theory of the lien is, that the party by whom the labor is performed or materials furnished for the erection or repair of buildings, on credit, retains his claim to them after they have entered the structure and become inseparably connected with it.

The object of the statute is to create and preserve ample security to the laborer or material man, and, therefore, to charge the estate with a lien, or incumbrance, independent of any personal remedy he may have.

The artificer or business man acquires a qualified property in the thing upon which he has bestowed his time and labor, or into which he has incorporated his materials. The very principle upon which his right is grounded comes from the increased value of the property he has brought about, by the accession of his labor or materials, and is purely an equitable one.

And the owner thus benefited holds his property subject to and liable for this equitable claim, which grows out of and depends upon this enhanced value of his interest. We are of opinion that this lien, being an equitable right, or in the nature of an equitable right, must be enforced in conformity to the established rules and principles governing proceedings in chancery. We hold, there-

fore, that in so far as the mechanic's lien law of this territory authorizes the rendering of a personal judgment as at law, it blends law and equity together in the proceeding, is in contravention of the organic act, is in conflict with the doctrine laid down by this court in the case of Gallagher et al. v. Basey et al., decided at the last term, and of Woolman et al. v. Garringer et al., by which it was re-affirmed at the present term, and is void and of no effect.

The case is remanded, and the judment is modified in conformity with the order made at the last term. * * *

PUBLIC PROPERTY.

JORDAN et al. v. BOARD OF EDUCATION OF TAYLOR'S FALLS.

39 Minn. 298, 39 N. W. 801. 1888.

The facts are stated in the opinion.

MITCHELL, J.—The only question here is whether under chapter 170, Gen. Laws 1887, a public school-house is subject to a lien for work done or materials furnished towards its erection. While in some states it is held that what may be called the private property of municipal corporations—that is, such as they own for profit, and not for a public use—may be sold on execution, yet the universal rule is that, in the absence of express statutory authority, the property of such corporations, held for and devoted to a public use, is not liable to execution on a general judgment. This rule is founded upon considerations of public policy, obvious from the very nature of such corporations, and the purposes for which they are created. They are mere agencies of the state, brought into being in aid of the civil government of the state in the administration of the local affairs of the districts incorporated. The power to sell, on execution, their property held and used for public purposes, such as court-houses, jails, poor-houses, hospitals, school-houses, and the like, would be fraught with great public evils, and subversive of the very purposes for which such corporations were created. Therefore, for the enforcement of judgments against municipal corporations, the courts have allowed another writ, *mandamus*, to compel payment, or the levy of a tax for that purpose.

This secures the fruits of the judgment, and leaves the public property intact, for the use to which it is devoted. 2 Dill. Mun. Corp. § 576; * * *. For the same reasons, and upon the same considerations of public policy, property which is exempt from execution, on a general judgment against municipal corporations, is also exempt from the operation of a mechanic's lien law, unless it expressly appears by the law that such property was intended to be included; and to warrant this inference something more must appear than a general provision that the claim is to be a lien upon a particular class of property. Unless the state of Kansas be an exception (see Wilson v. School-Dist., 17 Kan. 104), this principle of construction is, so far as we can ascertain, universal. The authorities are numerous, and will be found cited in any text-book on the subject. See Phil. Mech. Liens, § 179; 2 Jones, Liens, § 1375; Overt. Liens, § 543; Kneel. Mech. Liens, § 84. While enough can be gathered from the crude and obscure provisions of this statute to indicate that it was designed to be, in many respects, a radical and drastic measure, yet there is nothing in its language expressive of a legislative intent to repudiate or repeal a doctrine founded upon such a satisfactory basis of public policy. In view of the principle governing the construction of such statutes already referred to, which had been so universally adopted, it is to be presumed that if the legislature had intended to change the law in that respect they would have so declared in express terms. It is contended, however, that this rule of construction, as applied to lien laws, is predicated upon, and follows as a consequence, from the doctrine that such property is exempt from execution upon a general judgment; and hence is, in this state, inapplicable to school-districts whose property may, in a certain contingency, be sold on execution. Gen. St. 1878, c. 36, §§ 119-122. If a public school-house could be sold under a general judgment, the same as the property of a natural person or a private corporation, there would probably be no good reason why it should not be held subject to the operation of a mechanic's lien law, at least in favor of the creditors of the district. But it will be observed that it is only upon a remote and improbable contingency that any execution can be issued against a school-district. It is only after a specific tax has been levied for the payment of the judgment, and the time for the collection of the tax, and for paying over the money by the county treasurer, has expired, and the district still fails to pay the judgment. Ample opportunity is thus given to raise funds with which to pay the judgment, without endangering school prop-

erty. But under this lien law the court rendering the judgment is required immediately to order the sheriff to sell the property on three weeks' notice. Under such procedure, a school-house might be sold for a small part of its value, and be irretrievably lost, before any funds could be raised by taxation with which to pay the judgment or redeem the property. It may also be suggested that, if such property is subject to the provisions of this statute, it would be so, not merely in favor of creditors of the school-district,, but also in favor of laborers and material-men to whom the district owed nothing, and with whom it had no contract relations. It would require more than is found in this statute to justify us in holding that the legislature intended to make so radical a change in the law as to subject the public property of these governmental agencies to liens in favor of laborers or material-men. *Order affirmed.*

PRIORITY OF CLAIM OF CONDITIONAL VENDOR.

SHAW v. WEBB.

131 Tenn. 173, 174 S. W. 273, 1915 D. (L. R. A.) 1141. 1915.

The facts are stated in the opinion.

WILLIAMS, J.—Shaw sold an automobile to one Akers, the purchase price being represented in two notes, each of which contained a stipulation retaining title to the machine to secure payment. The machine passed at once into the possession of the vendee. Some time thereafter it became necessary to have some repairs made on it, and the automobile was taken to Webb, a mechanic, about the date of the maturity of the first note. After the repairs were placed the machine was turned back by the mechanic to the conditional vendee, Akers. On default being made in the payment of the first maturing note, Shaw, by writ of replevin, repossessed himself of the machine. Suit was thereupon brought by Webb, the mechanic, against Shaw, the vendor, to enforce a claimed mechanic's lien on the automobile for the amount of the repair bill so created.

This action was predicated upon a recent statute (Acts 1909, chap. 150) which provides: "That there shall be a lien upon any

vehicle * * * for any repairs or improvements made or fixtures or machinery furnished at the request of the owner or his agent in favor of the mechanic, contractor, founder, or machinist who undertakes the work," etc.

Judgment was rendered in favor of the mechanic by the circuit judge, who tried the case without the intervention of a jury. On appeal that judgment was affirmed by the court of civil appeals; and we are, by petition for *certiorari,* asked to review the judgment of the court last named.

The mechanic had no actual notice of the retention of title; and the conditional vendor did not know that the machine was placed with the mechanic to be repaired. It is to be noted that we are not dealing with a claim by Webb to the artisan's common-law lien which depends for validity, as against third parties, upon the retention of possession on the part of the artisan. Here Webb had parted with possession, after the repairs were made on the automobile, to Akers, the conditional vendee.

However, the few cases that pass upon the right of an artisan in possession and claiming such common-law lien as against a conditional vendor of the personalty repaired by analogy shed much light upon the point we have to decide.

In Baughman Automobile Co. v. Emanuel, 137 Ga. 354, 38 L. R. A. (N. S.) 97, 73 S. E. 511, we understand from the report of the case that such common-law lien was relied upon by a mechanic for repairs put by him on an automobile, under contract with a conditional vendee in possession, and the court held that the artisan's lien was subordinate to the right of the vendor, standing on his title retained. In that case it appeared that the lien claimant had knowledge of the rights of the conditional vendor at the time the work on the machine was done.

Small v. Robinson, 69 Me. 425, 31 Am. Rep. 299, involved a contest between the conditional seller of a hack, which had been in the possession of the vendee for about two years, and a mechanic urging the common-law lien of an artisan. A like ruling was made in favor of the conditional seller.

If we go, for further analogy, to the law governing chattel mortgages, we find the rulings to be at least apparently variant. The artisan's common-law lien has been held to be subordinate to the rights of a mortgagee of such a chattel under a registered instrument; and the fact that the mortgagor is permitted to remain in possession, in the absence of a statute providing otherwise, affords no implied authority on his part to subject the chattel to such a

lien in priority. A lien attaches, it is held, but only to the mortgagor's interest. Denison v. Shuler, 47 Mich. 598, 41 Am. Rep. 734, 11 N. W. 402, and cases cited; Bissell v. Pearce, 28 N. Y. 252; Hampton v. Seible, 58 Mo. App. 181, overruling, it would seem; Kirtley v. Morris, 43 Mo. App. 144; 7 Cyc. 39.

Other cases uphold the priority of the artisan's lien, over the mortgagee's title, in instances where there may fairly be implied a consent, on the part of the mortgagee, that the mortgagor, while in the use of the chattel, may have it repaired. Thus, in Watts v. Sweeney, 127 Ind. 116, 22 Am. St. Rep. 615, 26 N. E. 680, it was held that a machinist was entitled to prevail on such a lien as against the claim of the mortgagee of a locomotive, the mortgagor being a public or common carrier, and the repairs being made after the condition of the mortgage was broken and the mortgage debt had become due.

In Hammond v. Danielson, 126 Mass. 294, the subject-matter was a hack let for hire which had been mortgaged and described in the mortgage as "now in use" in a certain livery stable. The mortgagor was left in possession agreeably to the terms of the mortgage; that is, the manifest intention of the parties was that the hack should continue to be driven for hire and kept in a proper state of repair for that purpose. For repairs made under contract with the mortgagor the artisan's lien was awarded priority.

In Ruppert v. Zang, 73 N. J. L. 216, 62 Atl. 998, in an opinion by Pitney, J., it was held that a common-law lien had priority over a mortgage when claimed for repairs upon a wagon by an artificer, made without the knowledge of the mortgagee.

However, in the cases of Watts v. Sweeney and Ruppert v. Zang, *supra*, the distinction between the effect of such a common-law lien and a statutory lien of a mechanic was noted—whether properly so is a debatable point. Judge Pitney, in the last-named case, refers to Sullivan v. Clifton, 55 N. J. L. 324, 20 L. R. A. 719, 39 Am. St. Rep. 652, 26 Atl. 964, as a case pointing out the ground of such a distinction. It was said in Sullivan v. Clifton: "It is one of the characteristics of common-law liens which arise, upon considerations of justice and policy, by operation of law, as distinguished from liens created by contract or statute, that the former, as a general rule, attach to the property itself without any reference to ownership, and override all other rights in the property, while the latter are subordinate to all prior existing rights therein."

See also D'Gette v. Sheldon, 27 Neb. 829, 44 N. W. 30; 25 Cyc. 678.

We think it manifest that if the New Jersey court had been dealing with a claim that could only have had basis on a statute, like the one in the pending case, it would have held the same inferior to the mortgage lien.

Coming now to precedents which contrast the rights of statutory lien claimants with those of mortgagees under previously registered chattel mortgages:

In McGhee v. Edwards, 87 Tenn. 506, 3 L. R. A. 654, 11 S. W. 316, it was ruled that the statutory lien of a livery stable keeper on a horse must yield to the lien of such a mortgagee, where the lien claim arises under contract with the mortgagor in possession before the maturity of the mortgage. In accord are many cases relating to the statutory lien for pasturage of live stock. * * *

Thus, in the recent case of Adler v. Godfrey, 153 Wis. 186, 140 N. W. 1115, it was held that the fact that the mortgagor is permitted to remain in possession of a mortgaged automobile affords him no implied authority to create a lien thereon for storage (a lien by statute in that state) superior to the rights of the mortgagee, and that the rights are not changed by the fact that the mortgagee knew that the mortgagor was keeping the machine in a public garage.

The claim advanced in this case in behalf of Webb as lienor is based upon a statute which awards a lien, notwithstanding the mechanic may have parted with possession, upon any vehicle "for any repairs or improvements made * * * at the request of the owner or his agent," but saving the rights of purchasers without notice under good-faith transfers.

The question for solution, then, is: Is this statutory lien superior to the rights of Shaw, the conditional vendor?

We have not been cited, nor have we been able to find, where the point in the presented phase has been ruled in any reported case. We are of opinion, however, that on the above and other analogies of the law, the lien claimant must fail in the pending case.

The Michigan court ruled in Presque Isle, Sash & Door Co. v. Reichel, 179 Mich. 466, 146 N. W. 231, that the title of a conditional seller of a saw has priority over a statutory lien of a laborer for services in installing the saw in a mill under contract with the vendee.

Where real estate is the subject-matter of transfer and the vendor retains the legal title, it is not within the power of the vendee, under a bond for title or under a contract to convey (nothing else

appearing), to fix a mechanic's lien upon the property which will be superior to the title so retained. Gillespie v. Bradford, 7 Yerg. 168, 27 Am. Dec. 494; Rhea v. Allison, 3 Head 176; Belnap v. Condon, 23 L. R. A. (N. S.) 601, note.

In this state, the retention by a vendor of the title to personal property to secure the purchase money partakes of the nature of a lien. McDonald Automobile Co. v. Bicknell, 129 Tenn. 493, 167 S. W. 108, and cases cited. Such title, when retained in a written contract, unregistered, is superior to any right acquired by a purchaser for value and without notice. * * *

It is not easy to conceive, then, how the title retained or lien that is prior in time may be supplanted by a junior lien, created by statute in behalf of a mechanic, without the concurrence of the holder of the precedent lien; and it is not contended that any such express assent or concurrence is shown in the pending case.

There are cases which hold that such consent may be implied from the nature of the transaction or from the circumstances. In Hammond v. Danielson, and Watts v. Sweeney, *supra*, the chattels were in use by public carriers, and the courts found room to imply such consent. In Drummond Carriage Co. v. Mills, 54 Neb. 417, 40 L. R. A. 761, 69 Am. St. Rep. 719, 74 N. W. 966, involving a buggy, the court construed the language of the mortgage to have had the making of repairs in contemplation. * * *

We are of opinion, therefore, that something more is required than the fact that a vehicle, which may need repair in order to continued personal use by the vendee, is placed in the possession of the conditional vendee. The vendor in such case should not be considered as consenting in advance to the subordination to that which both parties patently intended to make superior—the title retained for the security of the payment of the purchase money.

* * * To announce a doctrine such as is contended for by the mechanic in this case would be to deprive a note which contains a reservation of title to personalty of a no inconsiderable element of marketability. The transferee of such paper should not, we believe, take it subject to the risk of having his right embarrassed or lessened by such act of the vendee maker, when the note contains nothing to put him on notice.

It should, perhaps, be noted, by way of parenthesis, that a distinction is taken by the authorities between such a claim of a mechanic and the common-law lien of an innkeeper on a chattel held in possession as conditional vendee by a guest. To such a chattel brought upon his premises, the lien attaches in favor of the inn-

keeper, provided he had no notice of the nature and extent of the guest's title when the property was brought into the inn. In such case the common-law imposed upon the innkeeper the obligation to receive the guest and his baggage, and that liability is deemed sufficient to give rise to a coextensive lien. So to speak, by way of recompense for the enforced obligation, the lien is held to attach to the property regardless of the true ownership.

The Court of Civil Appeals in its judgment awarded priority to the mechanic on his claim to a paramount lien. Reversed, with judgment here in accord with this opinion.[15]

RULE OF CONSTRUCTION.

SMALLEY et al. v. NORTHWESTERN TERRA-COTTA CO. et al.

113 Mich. 141, 71 N. W. 466. 1897.

The facts are stated in the opinion.

MOORE, J.—The defendant Schmidt, the owner of land in Detroit, in the spring of 1895 contracted with Mr. Gearing, a building contractor, for the erection of a business block thereon. In the fall of 1895, when the building was partially completed, a number of material men filed liens against the lot and building for materials which they severally claimed to have furnished to Mr. Gearing. The original bill of complaint in this cause was filed in January, 1896, for the enforcement of one of these liens, and the other lien claimants and the defendant Schmidt, as owner of the land and building, were made defendants. On March 17, 1896, the defendant, the Northwestern Terra-Cotta Company, one of the lien claimants, filed an answer in the nature of a cross bill, praying for the enforcement of its lien, which was filed on the 14th day of November, 1895.

[15] Whether various types of liens or chattel mortgages are given priority, one over the other, is largely a matter of statutory regulation. See Burrow v. Fowler, 68 Ark. 178, 56 S. W. 1061; Wilson v. Donaldson, 121 Cal. 8, 53 Pac. 404, 43 L. R. A. 524, 66 Am. St. Rep. 17; Allred v. Haile, 84 Ga. 570, 10 S. E. 1095; Case v. Allen, 21 Kan. 217, 30 Am. Rep. 425; Denison v. Shuler et al., 47 Mich. 598, 11 N. W. 402, 41 Am. Rep. 734; Garr, Scott & Co. v. Clements, 4 N. Dak. 562, 62 N. W. 640; Reeves & Co. v. Russell et al., 28 N. Dak. 265, 148 N. W. 654, 1915 D. (L. R. A.) 1149; Olsen v. Smith, 84 Wash. 228, 146 Pac. 572.

To this answer, in so far as it claims the benefit of a cross bill, the defendant Schmidt filed a general demurrer on the 19th day of March, 1896. On January 2, 1897, the court sustained the demurrer, upon the ground that the answer failed to show that any copy of the statement of lien filed with the register of deeds was served upon the defendant Schmidt, and that it failed to show that any proof of service of a copy of that statement upon said defendant Schmidt was filed in the office of the register of deeds before the institution of proceedings to enforce the lien. The order gave leave to amend. Upon the same day an amended answer was filed, setting up the service of a copy of the statement upon Schmidt on the 22d day of November, 1895, and averring that on the 11th day of December, 1896, proof of that service by affidavit was filed in the office of the register of deeds. Immediately upon the filing of this amended answer, a demurrer thereto was filed. * * * Upon the same day, January 22, 1897, this demurrer was sustained, and the amended answer in the nature of a cross bill, in so far as it claims the benefit of a cross bill against the defendant Schmidt and his property, was dismissed. From this order the terra-cotta company takes the present appeal. No demurrer or other objection was filed by any other person than defendant Schmidt to this answer in the nature of a cross bill.

* * * The question, then, is whether, when all the steps to establish a lien have been taken, except the filing with the register of deeds of proof of service of the statement of lien on the owner before commencing proceedings to enforce the lien, the proceedings must fail.

It is the contention of the appellee that, as this is a proceeding in derogation of the common law, the statute must be strictly construed, and, as the pleadings do not show a compliance with the law, the proceeding must fail. It is admitted on the part of the appellant that, as to all those requirements of the statute necessary to create the lien, the statute is mandatory, and must be followed; but it is claimed that after the lien is once established its provisions are directory, and that if such steps are taken as fully protect the owner, as in this instance, by giving him notice of the claim within the time fixed by statute, he is not harmed, and cannot complain. It has long been the settled law in this state that these proceedings are purely statutory, and that, to create a lien under them, the statute must be followed in all its essentials. Wagar v. Briscoe, 38 Mich. 587; Electric Co. v. Norris, 100 Mich. 496, 59 N. W. 151; Mercantile Co. v. Mosser, 105 Mich. 18, 62 N. W. 1120.

In the case of Sheridan v. Cameron, 65 Mich. 680, 32 N. W. 894, which was a proceeding to enforce a mechanic's lien, where the proceedings were attacked on the ground that they were prosecuted too late and irregularly, the petition was filed within the 60 days allowed by statute, but it did not contain a prayer for process. The notice of *lis pendens* was filed after the 60 days expired. It was claimed that for these reasons the proceeding must fail. In discussing the case, Justice Campbell said: * * * The claim that the lien law is to be rigidly construed is not correct, in the full extent claimed. There is no doubt that a purely statutory lien must conform exactly to the statutory condition; but when it once attaches, and is put in process of foreclosure, the proceedings, while in part definitely fixed, are nevertheless in important particulars left to the general course of practice. No construction should be strained at in order to defeat them, but the rights of all parties should be harmonized and respected as far as is reasonably practicable." * * * In De Witt v. Smith, 63 Mo. 263, it is said: "The courts at one time were inclined to hold that enactments for mechanics' liens were in derogation of the common law, and their provisions should therefore be construed strictly against those who sought to avail themselves of their benefits; but the better doctrine now is that these statutes are highly remedial in their nature, and should receive a liberal construction, to advance the just and beneficent objects had in view in their passage. Their great aim and purpose is to do substantial justice between the parties, and this should never be lost sight of in giving them a practical construction. * * * The object of the law, so far as securing the validity of the owner is concerned, when a material man seeks to avail himself of the advantages, is that, by the notice, the owner may keep back enough of the contract price to indemnify himself against the liability." In that case it was held that, as between the mechanic and the owner, the lien would not be defeated where the property was described as a three-story brick building on lots 19 and 20, block No. 2, when it should have been block 20, when the evidence disclosed the owner had no other three-story building for which material was furnished by the mechanic, and that he owned no other lots than those in block 20. * * * In Bullock v. Horn, 44 Ohio St. 420, 7 N. E. 737, in construing the lien law of that state this language was used: "The statute is highly remedial in its character, and should receive such liberal construction as will carry out the purpose of the legislature in its enactment. The labor of the workmen and the material of the

material man having contributed to the erection of the structure, —having, indeed, created in part the very property on which the lien is sought to be attached,—the purpose of the law is to give to such parties the right, where the contractor refuses to pay, to be paid for their labor and material out of the fund which has been earned under the contract, and out of the structure and the land upon which it stands; such claim, as to amount, not to be in excess of the claim of the contractor as measured alone by the contract and his performance of it." And it is held the statute should be given such a construction as would carry out its object. It may be difficult to harmonize all of the language in these decisions. It seems to me, however, that the rule is correctly stated in Jones, Liens, § 1554, where it is said: "The rule of construction applicable to questions arising under these liens may be strict at one stage of the proceedings and liberal at another. Mechanics' liens are in derogation of the common law, depending for their existence wholly upon statutes, and therefore upon the question whether a lien attaches at all a strict construction is proper." Section 1556 of the same author reads: "But, after the lien has attached, a liberal construction should be put upon the statute, for the purpose of fulfilling its objects. The statute is highly remedial in its nature, and should receive a practical and reasonable construction to effect its objects."

All of the proceedings required by the statute to create a lien, up to the time when proceedings were about to be instituted to enforce the lien, had been taken. The statute does not require the filing of proof of service of notice in order to establish the lien, but simply makes that a prerequisite to the proceedings to enforce the lien. The object of a notice to the landowner is to prevent him from paying the principal contractor. * * * The case would be very different if he was an intervening lienor or a subsequent purchaser. He had all the notice that it was possible to give, and I do not see how he can complain of a failure to file proof of the service of a notice upon him with the register of deeds. I think all of the essentials of the statute, so far as they relate to him, have been met. * * * The demurrer should have been overruled.

The decree is reversed, and defendant Schmidt is given 20 days in which to answer.[16]

[16] The statute creating a mechanic's lien, being in derogation of the common law, should be strictly construed. Newell v. Campbell Machine Co., 17 R. I. 74, 20 Atl. 158.

GIFTS.

Definition, Classification.

WALSH'S APPEAL.

122 Pa. St. 177, 15 Atl. 470, 9 Am. St. 83, 1 L. R. A. 535. 1888.

[Margaret Tyrrell was a depositor in the Philadelphia Saving Fund Society. Her deposits were held by the bank under the rules of the law merchant and the regulations peculiar to this institution. During her last sickness she handed her bank book to one Thomas Doyle, telling him that in case she died the money was to go to her sister, Catherine Tyrrell, in Ireland, but in case she did not die, she wanted it back. Margaret Tyrrell died and the court awarded her sister, Catherine, the money, whereupon, Nellie J. Walsh, the administratrix of Margaret Tyrrell's estate, appealed.]

WILLIAMS, J.—A gift is more than a purpose to give, however clear and well settled the purpose may be. It is a purpose executed. It may be defined as the voluntary transfer of a chattel completed by the delivery of possession. It is the fact of delivery that converts the unexecuted and revocable purpose into an executed and therefore irrevocable contract. All gifts are necessarily *inter vivos,* for a living donor and donee are indispensable to a valid donation; but when the gift is prompted by the belief of the donor that his death is impending, and is made as a provision for the donee, if death ensues, it is distinguished from the ordinary gift *inter vivos,* and called *donatio causa mortis.* But by whatever name called, the elements necessary to a complete gift are not changed.

There must be a purpose to give; this purpose must be expressed in words or signs; and it must be executed by the actual delivery of the thing given to the donee or someone for his use; in every valid gift a present title must vest in the donee, irrevocable in the

Contra: Shaw et al. v. Young et al., 87 Me. 271, 32 Atl. 897.

A homestead is subject to mechanic's lien the same as other property. McAlister v. Des Rochers et al., 132 Mich. 391, 93 N. W. 887; Darling v. Neumister, 99 Wis. 426, 75 N. W. 175; Bonner v. Minnier et al., 13 Mont. 269, 34 Pac. 30, 40 Am. St. Rep. 449.

Contra: Coleman v. Ballandi, 22 Minn. 144; Morgan et al. v. Beuthein et al., 10 S. Dak. 650, 75 N. W. 204, 66 Am. St. Rep. 733.

Mechanic's lien will not attach where building is destroyed before completion. Goodman et al. v. Baerlocher, 88 Wis. 287, 60 N. W. 415.

For scope of farm laborer's lien see Lowe v. Abrahamson et al., 18 N. Dak. 182, 119 N. W. 241, 19 L. R. A. (N. S.) 1039.

ordinary case of a gift *inter vivos,* revocable only upon the recovery of the donor in gifts *causa mortis.* Wells v. Tucker, 3 Binn. 366; Nicholas v. Adams, 2 Whart. 17; 6 Bac. Abr. p. 162.

The thing given must be susceptible of delivery. In the case of money on deposit, or loaned out, the certificate of deposit, or the bill, note, or bond may be delivered properly indorsed, and it will confer on the donee an absolute title to the fund represented by it. But if there remains something for the donor to do before the title of his donee is complete, the donor may decline the further performance and resume his own. This is true of both classes of gifts, and there can be no good reason for distinguishing between them in this particular. Scott v. Lauman, 104 Pa. 593.

As to gifts *inter vivos,* it was distinctly held in Bond v. Bunting, 78 Pa. 210, that an assignment or some equivalent instrument was necessary in order to pass title to a chose in action. The reason is that a gift is incomplete which does not clothe the donee with the rights and powers of ownership, and these rights and powers do not vest without a complete delivery. Michener v. Dale, 23 Pa. 59; Fross' Appeal, 105 Pa. 258.

In the case of Basket v. Hassell, 107 U. S. 602 [27 L. Ed. 500], a certificate of deposit was indorsed: "Pay Martin Basket, no one else, then not till my death," and so indorsed it was delivered to the donee; but it was held that no valid *donatio causa mortis* was shown, because a delivery of the certificate with the indorsement did not clothe the donee with the rights and powers of an owner. The certificate was put into the hands of the donee, but he was unable to make use of it, because of the limitation in the assignment.

So in Mitchell v. Smith [10 L. T. N. S. 520, 801], the indorsement upon the certificate was: "Pay the within contents to Simon Smith or his order at my death," and delivery of the indorsed certificate was made; but the gift was held to be incomplete, because no present control over the fund passed to the donee. If the certificate had been payable to bearer, mere delivery would have been enough to pass the title; and it has been held that in the case of notes and other instruments payable to order a delivery accompanied by words imputing a present absolute gift would invest the donee with the ownership of the fund.

The reason for this holding seems to be that the certificate, bill or note is the legal evidence of the deposit or debt, and that when the owner parts with the instrument by gift or sale he parts, at least prima facie, with the debt or deposit. The production of

the instrument or proof of its destruction or loss is indispensable to a recovery of the demand it represents, and the owner by his gift of the note parts with his own power over the debt of which it is the evidence.

In the case at bar Margaret Tyrrell was a depositor in the Philadelphia Saving Fund Society. Her deposits were held by the bank under the rules of the law merchant and the regulations peculiar to this institution. During her last sickness she handed her bank book to Thomas Doyle, saying: "The money there is for my sister in Ireland; but if I don't die I want it back." Our question is whether this passed the title to the fund in the hands of the bank as a *donatio causa mortis*. This depends to some extent upon the character of a depositor's bank book.

When a deposit is made in a bank, the depositor is credited upon the books of the bank with the amount deposited, and a duplicate entry of credit is made upon the bank book in his hands. He thus has at all times a statement of his credits in his account with the bank. His debits he may keep in any convenient manner. Or, if the rules of the bank require it, he may present his book with each check that the debits may be entered by the officers of the bank. The book is at most a statement of an account, showing how much has been deposited by the customer to be held by the bank upon the terms which the law or the agreement between the parties has provided. When withdrawn it is by means of checks, orders or such other form of voucher as the terms of the deposit or the usages of the institution may provide for. The mere possession of the book by the bank would afford no evidence of the payment of the money to the depositor. An assignment of such a book, like an assignment of a book of original entry, will operate to transfer the entire balance remaining due upon the account; but a delivery of it will no more transfer the fund than will a delivery of a book of original entries transfer the balances due upon the several accounts contained therein.

This is substantially decided in People's Sav. Bank v. Cupps, 91 Pa. 315. Mrs. Cupps placed her bank book in the hands of her son. He presented it at the bank, together with a forged check in his own favor, and the fund was paid to him. Mrs. Cupps brought suit to recover the amount of her deposits, and the bank set up the possession of the book by the son and its production by him, when the check was presented, as a defense. This defense, however, did not avail, and the plaintiff was permitted to recover from the bank.

When Margaret Tyrrell handed her book to Mr. Doyle, saying, "The money there is for my sister," she did not invest her sister or Doyle as her representative with any control over the fund. The ownership did not pass out of her. There was no delivery of a check, order, assignment or other instrument which would have served as a voucher if the money had been paid by the bank, or by means of which the money could have been properly demanded.

As a gift *inter vivos* it was not good, for the control of the donor over the fund continued. In Duffield v. Elwes, 1 Bligh. N. R. 527, a distinction was taken between gifts *inter vivos* and those made *causa mortis,* to which our attention has been drawn. It was there said: "I apprehend that really the question does not turn at all upon what the donor could do, or what the donor could not do; but, if it was a good *donatio causa mortis,* what the donee of that donor could call upon the representatives of the donor to do after the death of that donor." If this is to be understood, as is urged in the argument, that the personal representatives of a decedent may be compelled to complete a gift which was left incomplete by the alleged donor, we can not assent to the doctrine; nor do we quite understand what is meant by the passage from the opinion cited. If the gift was "a good *donatio causa mortis*" then nothing remained to be done by the donor that was essential to the vesting of title in his donee; and the converse of the proposition is equally clear: that if anything remained to be done by the donor which was essential to complete his donee's title, it was not a good *donatio,* but an unexecuted, possibly an abandoned, purpose to give.

If, therefore, the case presented was that of a good *donatio,* the only questions that could be raised between the donee and the personal representatives of the donor would be those relating to matters of form, affecting, not the title of the donee, but the use of appropriate remedies against third persons for the recovery of the gift. If it was not a good *donatio* the courts would have no jurisdiction. The estates of those who can no longer speak for themselves stand in much greater need of protection than living property owners, and it is not possible that a chancellor would compel an executor or administrator to complete a gift by the doing of any act which the alleged donor, if living, might have refused to do, and thereby revoked his purpose to give. In the case of a book of original entries—a bank book—an executory contract, and the like, where the possession of the document affords no presumption of ownership, something more is necessary than

the manual delivery of the book or paper in order to make a valid gift. The title must pass out of the donor in his lifetime or it can never reach the donee.

Judgment reversed.[17]

INTER VIVOS.

LOVE v. FRANCIS et al.

63 Mich. 81, 29 N. W. 843. 1886.

The facts are stated in the opinion.

CHAMPLIN, J.—On April 28, 1866, Cyrus K. Francis was the owner in fee of 49 acres of land situated in the township of Texas, Kalamazoo county, Michigan. He had four children living at that time, namely, Theodore and Charlemagne Francis, Harriet Bell, and Elizabeth Barrett. Another of his daughters had died, leaving two children, who were then living, named Byron H. Fox and Estella Brown. These persons were his heirs at law at the time of his death, which occurred on the eighteenth day of March, 1880. On the said twenty-eighth day of April, 1866, Cyrus K. Francis conveyed by deed to his son Charlemagne Francis the 49 acres of land. The consideration expressed in the deed, although nothing was paid down, was $1,600. Upon the receipt of this conveyance, Charlemagne Francis made and delivered to his father Cyrus K., his promissory note as follows:

KALAMAZOO, April 28, 1866.

"For value received, I promise to pay to the legal heirs of Cyrus K. Francis, four years after his death, sixteen hundred dollars, with 7 per cent. interest per annum, and payable annually to the said Cyrus K. Francis during his natural life-time; at his death the interest to cease. The payment of this note is secured by mortgage on real estate of even date herewith, and stamped with revenue stamp of two dollars. CHARLEMAGNE FRANCIS."

To secure the payment of this note, on the same day Charlemagne made, executed, and delivered to Cyrus K. Francis a mortgage covering the same lands conveyed to him by his father, in which it is

[17] See Childs' Personal Property, §§ 218, 224, 228, 229.

stated that the mortgage was made to secure a part of the purchase money for the premises therein described. The mortgage contains the usual power of sale in case of default. Cyrus K. Francis caused this mortgage to be recorded on the twenty-eighth day of April, 1866, but retained possession of the note until his death. Charlemagne Francis went into possession of the property conveyed to him, and thereafter paid to Cyrus K. Francis the annual interest as it matured upon the note for the years 1867, 1868, and 1869. For the three years following, Charlemagne neglected to pay the interest. In July, 1872, there was due for unpaid interest $336, and Cyrus K. Francis commenced a suit in the circuit court for the county of Kalamazoo in chancery to foreclose the mortgage. In this suit Cyrus K. Francis was the sole complainant, and Charlemagne was the sole defendant. Personal service of subpœna to appear and answer was had, and a decree for a foreclosure by sale was duly entered for the interest due. * * *

The decree was entered March 6, 1873, and authorized a sale of the mortgaged premises if the amount reported due was not paid by July 15, 1873. On June 14, 1873, Charlemagne Francis sold and assigned his interest, which he then had as heir at law of Cyrus K. Francis, in the sum of $1,600, payable to the heirs of Cyrus K. Francis, and secured by said mortgage to the complainant, and on the sixteenth of June, 1873, said Charlemagne sold and conveyed the mortgaged premises to the complainant. This conveyance was subject to the mortgage above referred to, and was conditional that complainant should pay the mortgage as so much purchase money for the premises. Complainant has paid the amount found due by the decree, and has paid all interest on the note up to the time of the death of Cyrus K. Francis. Upon the death of Cyrus, Theodore Francis was appointed administrator of his estate. * * *

In February, 1885, the complainant filed his bill of complaint, setting forth substantially most of the facts above narrated, and alleging that the defendant Theodore claimed that the moneys secured by the note and mortgage belonged to the estate of Cyrus K. Francis, and should be paid to him as the administrator thereof; that the other defendants claimed that said moneys belonged to the heirs of the said Cyrus, and should be paid to them without passing through the hands of the administrator; asserts that he is and has always been willing to pay said heirs or administrator, or both, said $1,600, except the share thereof assigned to himself by Charlemagne; prays that defendants may interplead, and settle between themselves to whom the money belongs, and asks leave

to redeem the premises from said mortgage, and to pay the redemption money into court, and that the mortgage may be discharged.

Defendants Theodore Francis, Harriet Bell, and Elizabeth Barrett answer, admitting the facts alleged in the bill, except that they say that the making of said conveyance by Cyrus K. Francis to Charlemagne, and taking the note and mortgage from him in the manner provided, was in pursuance of the purpose then entertained by Cyrus K. Francis in his life-time to distribute the avails of this real estate after his death. * * *

The defendants Byron H. Fox and Estella Brown answered separately, and admit the facts charged in the bill of complaint, and claim that they are entitled, as two of the heirs at law of Cyrus K. Francis, to the same share of the avails of said note that their deceased mother would have been entitled to if living.

The cause was heard in the court below upon proofs taken in open court, and a decree was rendered therein on the sixth day of January, A. D. 1886, that the said sum of $1,600 now belongs to the persons who were the children and grandchildren of Cyrus K. Francis at the date of the mortgage, or their legal representatives in case of the death of any, and that complainant, by assignment from Charlemagne Francis, stands in his place and stead, and succeeds to his share of said sum of $1,600 and interest; that complainant be allowed to redeem by paying into the hands of the register of the court, on or before three months, the said sum of $1,600 and interest; and that thereupon said mortgage be discharged. * * * It was further decreed that Theodore Francis, as administrator of the estate of Cyrus K. Francis, deceased, had no interest whatever in said mortgage debt.

From this decree Theodore Francis, on the tenth day of February, 1886, filed his claim of appeal, and executed the proper bond. * * * Our investigation into the merits of the whole controversy leads us to the conclusion that the decree below is correct, and should be affirmed.

Cyrus K. Francis, in his life-time, being the owner of 49 acres of land, wished to reserve to himself the income arising therefrom during his life, and to give the avails thereof to his heirs. One object was to prevent the distribution thereof through the ordinary channel of the probate court, and to make distribution thereof by his own hand during his life. To accomplish this object he converted the land into personalty, by conveying the same to Charlemagne Francis, and taking from him a promissory note for $1,600, payable to the heirs of Cyrus four years after the decease of him-

self. Interest at 7 per cent. per annum was to be paid to Cyrus, but was to cease upon his death. The payment of the principal and interest according to the note was secured by a mortgage upon the property sold, which Cyrus placed of record. The only question is whether the disposition thus made of the $1,600 constituted a valid gift *inter vivos* to the heirs. That such was the intention there can be no doubt from the transaction itself. To constitute a valid gift *inter vivos* there must be a delivery of the thing given, either actual or constructive. It is not necessary that it be delivered to the person intended directly. It may be delivered to some person for him, or to a trustee for that purpose, and in all cases such a disposition of it must be made in favor of the donee as effectuates the object and places the *jus disponendi* beyond the power of the donor to recall. Under some circumstances the donor himself may constitute himself trustee of the thing for the benefit of the donee. Ellis v. Secor, 31 Mich. 186; Green v. Langdon, 28 Mich. 221.

Such was the case here. The donor retained an interest in the avails of the fund given by way of the interest payable thereon during his life. The interest of the donor made it necessary, in the form he saw fit to adopt to carry out his purpose, to retain the actual possession of the note for his own security, but the same instrument evidenced the gift to his heirs as the designated object of his bounty. He had placed the mortgage on record, and had done all he could to make delivery consistent with his own rights in the paper, and was, by the transaction, a trustee for the heirs in the custody of the instrument by implication of law. It requires less positive and unequivocal testimony to establish the delivery of a gift from a father to his children than it does between persons who are not related, and in cases where there is no suggestion of fraud or undue influence very slight evidence will suffice. In this case there were several donees. A manual delivery could not be made of the instrument to all, but a constructive delivery was effected by making them the payees of the note, and recording the mortgage by which it was secured. By directing the note to be made payable to his heirs he placed the title in them at once, and it was unimportant in whose possession or custody the paper ought to remain. Whoever might hold such possession would do so in trust for them, and they alone could enforce payment.

In Wyble v. McPheters, 52 Ind. 393, where A. delivered several United States bonds to B. with directions for the latter to give the same to certain of his children at his death, B. received them, and

agreed to execute the trust. It was held that this was a sufficient delivery to constitute a gift *inter vivos,* and that upon the death of A. an action would lie against B. in favor of the children of A. to compel him to execute the trust, and also against the administrator of A. to whom B. had delivered the bonds.

Where H. had loaned to his adopted son large sums of money, and taken his notes, which he afterwards indorsed to his adopted son, but retained possession until the civil war, when he delivered them, with other notes, to the son to conceal, which he did in the house of the holder, where they remained until after the death of H., it was held that the notes were an irrevocable gift to the adopted son. Trowell v. Carraway, 10 Heisk. 104.

In Richardson v. Lowry, 67 Mo. 411, it was held that a note taken by the husband on a sale of his property, payable to his wife, was prima facie evidence of a gift to her.

In Malone's Estate, 13 Phila. 313, it was held any act on the part of the owner of a chose in action, showing not only a present intention to transfer, but that he regarded himself as having carried his intention into effect, is sufficient, without written evidence of the transaction, and that there is no difference between gifts *causa mortis* and gifts *inter vivos.* See, also, as bearing upon the question, Barker v. Frye, 75 Me. 29; Fletcher v. Fletcher, 55 Vt. 325; Eastman v. Woronoco Sav. Bank, 136 Mass. 208; Scott v. Berkshire Co. Sav. Bank, 140 Mass. 157; S. C. 2 N. E. Rep. 925; Basket v. Hassell, 107 U. S. 602; S. C. 2 Sup. St. Rep. 415.

Under these circumstances there was a constructive delivery of the note and mortgage, and all the delivery that could have been made in the nature of the case. * * *

The acceptance of a gift need not be made immediately. It is sufficient that it be accepted before revoked by death or otherwise. The fact that Charlemagne sold and assigned his interest in the sum payable to the heirs to the complainant seven years or more before the death of said Cyrus is evidence of acceptance, and, the gift being to him jointly with the other heirs, such acceptance being beneficial, inures to their benefit. * * *

The relief granted by the court below is consistent with the views above expressed, and the decree appealed from will be affirmed, with costs.[18]

[18] See Childs' Personal Property, § 228.

CAUSA MORTIS.

HATCHER v. BUFORD.

60 Ark. 169, 29 S. W. 641, 27 L. R. A. 507. 1895.

The facts as stated by the court are as follows:

T. A. Hatcher, a prosperous merchant of Forrest City, Ark., died December 10, 1891. He had never had any children, but left a widow, M. E. Hatcher, the appellant. About two months prior to his death, he sold an interest in his store to Walter Buford, his nephew, taking in payment therefor notes of the said Walter amounting to $2,500. These notes Hatcher indorsed to his sister Mrs. A. B. Buford, and mailed them to her on the 9th of October, 1891. About one month before his death, Hatcher directed his agent to buy $4,000 of bank stock, and, about 10 days before, $1,000 more. This stock was issued in the name of Mrs. Buford, and was delivered by Hatcher's agent to her son Walter. Hatcher made a will, in which, among other bequests, was a provision for his wife, and Mrs. Buford was declared residuary legatee and devisee. Appellant's bill (omitting non-essentials) sets up a renunciation of the will, and that the disposition of the notes and bank stock in the manner indicated was done with intent to defeat appellant's dower, and was fraudulent; that the lands of which her husband died seised were a new acquisition. She prays to be endowed of half the notes and bank stock, also of half the fee in the real estate. The answer denied the fraud, claimed an absolute gift of the personalty, and that dower in the realty should be of one half for life. The decree refused dower in the notes and bank stock, but granted it in one half the real estate in fee. Both parties have appealed, and the issues presented by this record are: *First.* Was there a gift? *Second.* If a gift, was it *inter vivos* or *causa mortis? Third.* If a gift *causa mortis,* did it defeat the widow's dower? * * *

WOOD, J.—1. Was there a gift? The only controversy on this point was as to the delivery. Delivery, of course, is essential to a gift. * * * The evidence supports the finding of the chancellor that there was a gift of the bank stock and notes.

2. Was the gift *inter vivos* or *causa mortis?* The *donatio inter vivos,* as its name imports, is a gift between the living. It is per-

fected and becomes absolute during the life of the parties. The *donatio causa mortis,* literally, "is a gift in view of death." But this does not give us an adequate conception of the gift as it is understood and treated by the authorities. We find from an examination of these that where one, in anticipation of death from a severe illness then afflicting him, or from some imminent peril to his life, to which he expects to be exposed, makes a gift accompanied by the delivery of the thing given either actual or symbolic, which is accepted by the donee, the law denominates such a gift a "*donatio causa mortis.*" * * * But it must not be forgotten that an absolute gift—one *inter vivos*—may be made by one upon his deathbed, and who is aware of the near approach of death from his then ailment. Thornton, Gifts & Advancements, § 21, p. 24, and authorities cited. Is there anything in the proof to overcome the presumption of gifts *causa mortis?* As to the notes, the testimony shows that Hatcher was up and at his store on the day these were executed; that they were delivered on the same day; and that the donor was able to drive out after this transaction. * * * We think the time and circumstances of the gift of the notes, as indicated by the proof, supports the chancellor's finding that this was a gift *inter vivos.* The same, however, cannot be said of the bank stock. Hatcher was upon his deathbed, and unable to attend to any business, when this was given. Four thousand was taken out about one month before his death, and one thousand only about ten days before. It was not delivered until a few nights before his death. We find nothing whatever in the proof to take the bank stock out of the presumption that it was a gift *causa mortis,* and nothing to support the chancellor's conclusion as to this.

3. Being a gift *causa mortis,* did it defeat the widow's dower? * * * Was the donor seised or possessed of the bank stock at the time of his death? The terms "seised" or "possessed," as thus used with reference to personalty, mean simply ownership, which carries with it the actual possession, or a right to the immediate possession. The real inquiry, then, is as to when the title or property in the subject matter of a *donatio causa mortis* passes. We are aware that there is conflict and confusion in the authorities upon this point, doubtless growing out of the modes of *donatio causa mortis* recognized originally by the Roman jurisprudence whence the doctrine is derived. Under one of these, the subject-matter of the gift became at once the property of the donee, but on condition that he should return it to the donor in the event of his recovery. Under another, the gift was made upon condition

that the thing given should become the property of the donee only in the event of the donor's death. Under the former, delivery was essential; under the latter, it was not. Thornton, Gifts & Advancements, p. 44; Ward v. Turner, 2 Ves. Sr. 431; Abbott, Cases on Wills, 169. Mr. Roper, in his work on Legacies, tells us that, after the contest upon the subject had subsided, Justinian gives a definition of "*donatio causa mortis,*" which alone is the proper one. 1 Roper on Legacies, 1. Mr. Pomeroy quotes this definition, and translates it as follows: "A *donatio causa mortis* is that which is made in expectation of death; as when anything is so given that, if any fatal accident befalls the donor, the person to whom it is given shall have it as his own; but if the donor should survive, or if he should repent of having made the gift, or if the person to whom it has been given should die before the donor, then the donor shall receive back the thing given." 3 Pom. Eq. Jur. § 1146. Judge Redfield, in his work on Wills, says: "The conclusion of Justinian's definition seems to embrace the essentials of the gift, viz., the gift is such that the donor prefers himself to retain dominion over it rather than have the donee acquire it. But he prefers the donee should have it rather than his heir." 3 Redf. Wills, 322. Those authorities which hold that the property in the thing given passes upon delivery and during the life of the donor have obviously followed the kind of *donatio causa mortis* referred to *supra,* existing under the Roman law prior to Justinian's definition, which recognized the subject-matter of the gift as becoming at once the property of the donee, defeasible upon a condition subsequent, and under which delivery was essential. This is a formidable position, and supported by high authority. Basket v. Hassell, 107 U. S. 602, 27 L. Ed. 500; Chase v. Redding, 13 Gray, 418; Marshall v. Berry, 13 Allen, 43; Thornton, Gifts & Advancements, § 46; Nicholas v. Adams, 2 Whart. 17; Daniel v. Smith, 64 Cal. 346; Emery v. Clough, 63 N. H. 552, 56 Am. Rep. 543; Schouler, Pers. Prop. § 137; Dole v. Lincoln, 31 Me. 422. Since the decision of Lord Hardwicke in Ward v. Turner, 2 Ves. Sr., *supra,* it has been the settled law of England that delivery is essential in gifts *causa mortis;* and there has never been any controversy upon that point in this country. Since delivery is an essential element to complete the transfer of title or property in personalty (Schouler, Pers. Prop. § 87), the authorities holding to the view that the title passes and becomes vested in the subject-matter of a *donatio causa mortis* during the life of the donor are dominated by the idea of delivery. But, while

delivery is a prerequisite to the transfer of title, it does not follow that there is always a transfer of title where there is a delivery, nor that the delivery of the chattel and the transfer of the title are coeval, in cases where the title is transferred. We think the better doctrine upon the transfer of the title to gifts *causa mortis* is that which accords with Justinian's definition, and recognizes the subject-matter of the gift as becoming the property of the donee in the event of the donor's death; i. e. the donor's death is a condition precedent to the vesting of the title to the thing given in the donee. This seems to be the rule adopted by the English courts of chancery, and is supported also by eminent American courts and text-writers. * * *

This view is certainly more consonant with the conditions which all the authorities agree attach to gifts of this kind: viz., that the reclamation of the donor, or his recovery from existing illness or escape from peril apprehended, or the death of the donee before that of the donor, will each, *ipso facto*, revoke the gift. Conser v. Snowden, 54 Md. 175, 39 Am. Rep. 368; * * *. This doctrine we have already approved in Ammon v. Martin, 59 Ark. 191, where, in speaking of *donatio causa mortis*, we said: "The title to the thing given remains in the donor, and the gift is subject to revocation at any time prior to his death." * * * But it may be said that this view abolishes all distinction between gifts *causa mortis* and testamentary dispositions, since the *donatio causa mortis* is wholly inchoate and conditional, not passing title until the donor's death. Many authorities do speak of the *donatio causa mortis* as but another form of testamentary disposition, and liken it unto the testamentary disposition, for the reason that it is revocable during the donor's life, is subject to his debts if there be a deficiency of assets, and does not become an absolute gift until the donor's death. Jones v. Brown, 34 N. H. 439; Baker v. Smith, *supra;* 2 Kent Com. 445; Schouler, Pers. Prop. 138. But while, in these particulars, it resembles a testamentary disposition, it differs from it, in that the subject-matter of the gift is delivered to the donee during the life of the donor, and at his death does not pass into the hands of the executor or administrator, but remains with the donee. This is not because the property or title has passed to the donee during the life of the donor, or that the donor is not actually seised in law at the time of his death, but because it is one of the peculiar characteristics of this species of gift that, at the donor's death, the donee takes, instead of the heir, according to the intention of the donor, as manifested during his life by delivery to the

donee. * * * Under our law, a man may deprive his children of their inheritance by his will if he names them. So, also, he may deprive them by a *donatio causa mortis*. But he cannot deprive the widow of her dower rights by either. And this for the reason, in both instances, that he dies "seised" of the property so conveyed. This, in our opinion, is the only consistent and logical conclusion; for if the title passes during the donor's life, and he has the absolute right to dispose of his personalty as he pleases, which he has, how can it be said that the donee's rights are inferior to those of the widow, except upon the doctrine above enunciated? * * *.

The decree of the chancellor is affirmed as to the notes and real estate. As to the bank stock, it is reversed, and the cause is remanded, with directions to enter a decree conforming to this opinion.[19]

DELIVERY.

BASKET v. HASSELL.

107 U. S. 609, 2 Sup. Ct. 415, 27 L. Ed. 500. 1883.

The facts are stated in the opinion.

MR. JUSTICE MATTHEWS.—This is a bill in equity, filed by the appellee, a citizen of Tennessee, to which, besides the appellant, a citizen of Kentucky, The Evansville National Bank of Evansville, Indiana, Samuel Bayard, its president, and Henry Reis, its cashier, and James W. Shackelford and Robert D. Richardson, attorneys for Basket, citizens of Indiana, were made parties defendant. The single question in the case was, whether a certain fund, represented by a certificate of deposit, issued by the bank to Chaney in his lifetime, belonged to Basket, who claimed it as a gift from Chaney, having possession of the certificate, or to the apellee, as Chaney's administrator. Basket asserted his title, not only by answer but by a cross-bill. The final decree ordered the certificate of deposit to be surrendered to the complainant, and that the bank pay to the complainant, as its holder, the amount due thereon. The money was then tendered by the bank, in open court, and the certificate was deposited with the clerk. It was, thereupon, ordered,

[19] See Childs' Personal Property, §§ 224, 229.

Basket having prayed an appeal, that, until the expiration of the time allowed for filing a bond on appeal, the bank should hold the money as a deposit, at four per cent interest; but if a bond be given, that the same be paid to the clerk, and by him loaned to the bank on the same terms. Basket failed to give the bond required for a *supersedas,* but afterwards prayed another appeal, which he perfected by giving bond for costs alone. To this appeal, Basket and the appellee are the parties respectively, the co-defendants not having appealed, or been cited after severance. And, on the ground that they are necessary parties, the appellee has moved to dismiss the appeal.

It is apparent, however, that the sole controversy is between the present parties to the appeal. By the delivery of the certificate of deposit to the clerk, the attorneys of Basket are exonerated from all responsibility; and the payment of the money by the bank, to the appellee, equally relieves it and its officers. * * * *The motion to dismiss the appeal is, accordingly, overruled.*

The fund, in respect to which the controversy has arisen, was represented by a certificate of deposit, of which the following is a copy:

"Evansville National Bank,

Evansville, Ind., Sept. 8, 1875.

"H. M. Chaney has deposited in this bank twenty-three thousand five hundred and fourteen and 70-100 dollars, payable in current funds, to the order of himself, on surrender of this certificate properly endorsed, with interest at the rate of 6 per cent per annum, if left for six months.

$23,514.70. HENRY REIS, *Cashier.*"

Chaney, being in possession of this certificate at his home in the county of Sumner, State of Tennessee, during his last sickness and in apprehension of death, wrote on the back thereof the following indorsement:

"Pay to Martin Basket, of Henderson, Ky.; no one else; then not till my death. My life seems to be uncertain. I may live through this spell. Then I will attend to it myself.

H. M. CHANEY."

Chaney then delivered the certificate to Basket, and died, without recovering from that sickness, in January, 1876.

It is claimed on behalf of the appellant that this constitutes a valid *donatio mortis causa,* which entitles him to the fund; and whether it be so, is the sole question for our determination.

The general doctrine of the common law as to gifts of this character is fully recognized by the Supreme Court of Tennessee as part of the law of that state. Richardson v. Adams, 10 Yerg. 273; Sims v. Walker, 8 Humph. 503; Gass v. Simpson, 4 Cold. 288.

In the case last mentioned, that court had occasion to consider the nature of such a disposition of property and the several elements that enter into its proper definition.

Among other things, it said:

"A question seems to have arisen, at an early day, over which there was much contest, as to the real nature of gifts *causa mortis*. Were they gifts *inter vivos*, to take effect before the death of the donor? or were they in the nature of a legacy, taking effect only at the death of the donor? At the termination of this contest, it seems to have been settled, that a gift *causa mortis* is ambulatory and incomplete during the donor's life and is, therefore, revocable by him and subject to his debts, upon a deficiency of assets; not because the gift is testamentary or in the nature of a legacy, but because such is the condition annexed to it and because it would otherwise be fraudulent as to creditors; for no man may give his property who is unable to pay his debts; and all now agree that it has no other property in common with a legacy. The property must pass at the time and not be intended to pass at the giver's death; yet, the party making the gift, does not part with the whole interest, save only in a certain event; and, until the event occurs which is to devest him, the title remains in the donor. The donee is vested with an inchoate title, and the intermediate ownership is in him; but his title is defeasable until the happening of the event necessary to render it absolute. It differs from a legacy in this, that it does not require probate, does not pass to the executor or administrator, but is taken against, not from him. Upon the happening of the event upon which the gift is dependent, the title of the donee becomes, by relation, complete and absolute from the time of the delivery, and that without any consent or other act on the part of the executor or administrator; consequently, the gift is *inter vivos*." In another part of the opinion (p. 297), it is said: "All the authorities agree that delivery is essential to the validity of the gift; and that, it is said, is a wise principle of our laws, because delivery strengthens the evidence of the gift; and is certainly a very powerful fact for the prevention of frauds and perjury."

In the first of these extracts there is an inaccuracy of expression, which seems to have introduced some confusion, if not an apparent

contradiction, when, after having stated that "The property must pass at the time and not be intended to pass at the giver's death," it is added, that "until the event occurs which is to devest him, the title remains in the donor." But a view of the entire passage leaves no room to doubt its meaning; that a *donatio mortis causa* must be completely executed, precisely as required in the case of gifts *inter vivos*, subject to be devested by the happening of any of the conditions subsequent; that is, upon actual revocation by the donor, or by the donor's surviving the apprehended peril, or outliving the donee, or by the occurrence of a deficiency of assets necessary to pay the debts of the deceased donor. These conditions are the only qualifications that distinguish gifts *mortis causa* and *inter vivos*. On the other hand, if the gift does not take effect as an executed and complete transfer to the donee of possession and title, either legal or equitable, during the life of the donor, it is a testamentary disposition, good only if made and proved as a will.

This statement of the law, we think, to be correctly deduced from the judgments of the highest courts in England and in this country; although as might well have been expected, since the early introduction of the doctrine into the common law from the Roman civil law, it has developed, by new and successive applications, not without fluctuating and inconsistent decisions.

"As to the character of the thing given," says Chief Justice Shaw, in Chase v. Redding, 13 Gray 418-420, "The law has undergone some changes. Originally it was limited, with some exactness, to chattels, to some object of value deliverable by the hand; then extended to securities transferable solely by delivery, as bank notes, lottery tickets, notes payable to bearer or to order, and indorsed in blank; subsequently it has been extended to bonds and other choses in action, in writing or represented by a certificate, when the entire equitable interest is assigned; and in the very latest cases on the subject in this Commonwealth, it has been held that a note not negotiable, or if negotiable, not actually indorsed, but delivered, passes, with a right to use the name of the administrator of the promisee, to collect it for the donee's own use," citing Sessions v. Moseley, 4 Cush. 87; Bates v. Kempton, 7 Gray 382; Parish v. Stone, 14 Pick. 203.

In the case last mentioned, Parish v. Stone, the same distinguished Judge, speaking of the cases which had extended the doctrine of gifts *mortis causa* to include choses in action, delivered so as to operate only as a transfer by equitable assignment or a declaration

of trust, says further, that "These cases all go on the assumption that a bond, note or other security is a valid subsisting obligation for the payment of a sum of money, and the gift is, in effect, a gift of the money by a gift and delivery of the instrument that shows its existence and affords the means of reducing it to possession." He had, in a previous part of the same opinion, stated that "The necessity of an actual delivery has been uniformly insisted upon in the application of the rules of the English law to this species of gift." P. 204.

In Camp's Appeal, 36 Conn. 88, the Supreme Court of Errors of Connecticut held that a delivery to a donee of a savings bank book, containing entries of deposits to the credit of the donor, with the intention to give to the donee the deposits represented by the book, is a good delivery to constitute a complete gift of such deposits, on the general ground that a delivery of a chose in action that would be sufficient to vest an equitable title in a purchaser is a sufficient delivery to constitute a valid gift of such chose in action, without a transfer of the legal title. That was the case of a gift *inter vivos*. But the court say, referring to the case of Brown v. Brown, 18 Conn. 410, as having virtually determined the point: "It is true that was a donation *causa mortis*, but the principle involved is the same in both cases, as there is no difference in respect to the requisites of a delivery between the two classes of gifts." And so Justice Wilde, delivering the opinion of the court in Grover v. Grover, 24 Pick. 261-264, expressly declared that "A gift of a chose in action, provided no claims of creditors interfere to affect its validity, ought to stand on the same footing as a sale:" that the title passed and the gift became perfected, by delivery and acceptance; that there was therefore, "No good reason why property thus acquired should not be protected as fully and effectually as property acquired by purchase;" and showed, by a reference to the cases, that there was no difference in this respect between gifts *inter vivos* and *mortis causa*.

In respect to the opinion in this case, it is to be observed, that it cites with approval the case of Wright v. Wright, 1 Cow. 598, in which it was decided that the promissory note, of which the donor himself was maker, might be the subject of a valid gift *mortis causa*, though the concurrence was not upon that point. That case, however, has never been followed. It was expressly disapproved and disregarded by the Supreme Court of Errors of Connecticut in Raymond v. Sellick, 10 Conn. 480, Judge Waite delivering the opinion of the court; had been expressly questioned

and disapproved in Parish v. Stone, 14 Pick. 198-206, by Chief Justice Shaw, and was distinctly overruled by the Court of Appeals of New York, in Harris v. Clark, 3 N. Y. 93. In that case it was said: "Gifts, however, are valid without consideration or actual value paid in return. But there must be delivery of possession. The contract must have been executed. The thing given must be put into the hands of the donee, or placed within his power by delivery of the means of obtaining it. The gift of the maker's own note is the delivery of a promise only, and not of the thing promised, and the gift therefore fails. Without delivery, the transaction is not valid as an executed gift; and without consideration, it is not valid as a contract to be executed. The decision in Wright v. Wright was founded on a supposed distinction between a gift *inter vivos* and a *donatio mortis causa.* But there appears to be no such distinction. A delivery of possession is indispensable in either case."

The case from which this extract is taken was very thoroughly argued by Mr. John C. Spencer for the plaintiff, and Mr. Charles O'Conor for the defendant, and the judgment of the court states and reviews the doctrine on the subject with much learning and ability. It was held that a written order upon a third person, for the payment of money, made by the donor, was not the subject of a valid gift, either *inter vivos* or *mortis causa;* and the rule applicable in such cases, as conceded by Mr. O'Conor, was stated by him as follows:

"Delivery to the donee of such an instrument as will enable him, by force of the instrument itself, to reduce the fund into possession, will suffice, is the plaintiff's doctrine. This might safely be conceded. It might even be conceded that a delivery out of the donor's control of an instrument, without which *he* could not recover the fund from his debtor or agent, would also suffice."

The same view, in substance, was taken in deciding Hewitt v. Kaye, L. R., 6 Eq. 198, which was the case of a check on a banker, given by the drawer *mortis causa,* who died before it was possible to present it, and which was held not to be valid. Lord Romilly, M. R., said: "When a man on his deathbed gives to another an instrument, such as a bond, or promissory note, or an I O U, he gives a *chose in action,* and the delivery of the instrument confers upon the donee all the rights to the *chose in action* arising out of the instrument. That is the principle upon which Amis v. Witt, 33 Beav. 619, was decided, where the donor gave the donee a document by which the bankers acknowledged that they held so much money

belonging to the donor at his disposal, and it was held that the delivery of that document conferred upon the donee the right to receive the money. But a cheque is nothing more than an order to obtain a certain sum of money, and it makes no difference whether the money is at a banker's or anywhere else. It is an order to deliver the money, and if the order is not acted upon in the lifetime of the person who gives it, it is worth nothing."

Accordingly the Vice-Chancellor, in In re Beak's Estate, L. R., 13 Eq. 489, refused to sustain as valid the gift of a check upon a banker, even although its delivery was accompanied by that of the donor's pass-book.

The same rule, as to an unpaid and unaccepted check, was followed in Nat. Bk. v. Williams, 13 Mich. 282. The principle is that a check upon a bank account is not of itself an equitable assignment of the fund, Bank v. Millard, 10 Wall. 152 (77 U. S., XIX 897), but if the banker accepts the check, or otherwise subjects himself to liability as a trustee, prior to the death of the donor, the gift is complete and valid, Bromley v. Brunton, L. R., 6 Eq. 275.

Contrary decisions have been made in respect to donations *mortis causa* of savings bank books, some courts holding that the book itself is a document of title, the delivery of which, with that intent, is an equitable assignment of the fund. Pierce v. Bank, 129 Mass. 425; Hill v. Stevenson, 63 Me. 364; Tillinghast v. Wheaton, 8 R. I. 536. The contrary was held in Ashbrook v. Ryon, 2 Bush 228, and in McGonnell v. Murray, Ir., Rep., 3 Eq. 460.

That a delivery of a certificate of deposit, such as that described in the record in this case, might constitute a valid *donatio mortis causa,* does not admit of doubt. It was so decided in Amis v. Witt *(supra);* in Moore v. Moore, L. R., 18 Eq. 474; Hewitt v. Kaye, L. R., 6 Eq. 198; Westerlo v. DeWitt, 36 N. Y. 340. A certificate of deposit is a subsisting chose in action and represents the fund it describes, as in cases of notes, bonds, and other securities, so that a delivery of it, as a gift, constitutes an equitable assignment of the money for which it calls.

The point, which is made clear by this review of the decisions on the subject, as to the nature and effect of a delivery of a chose in action, is, as we think, that the instrument or document must be the evidence of a subsisting obligation and be delivered to the donee, so as to vest him with an equitable title to the fund it represents, and to devest the donor of all present control and dominion over it, absolutely and irrevocably, in case of a gift *inter vivos,* but upon the recognized conditions subsequent, in case of a gift *mortis causa;*

and that a delivery which does not confer upon the donee the present right to reduce the fund into possesion by enforcing the obligation, according to its terms, will not suffice. A delivery, in terms, which confers upon the donee power to control the fund only after the death of the donor, when by the instrument itself it is presently payable, is testamentary in character, and not good as a gift. Further illustrations and applications of the principle may be found in the following cases: Powell v. Hellicar, 26 Beav. 261; Reddel v. Dobree, 10 Sim. 244; Farquharson v. Cave, 2 Colly. Ch. 356; Hatch v. Atkinson, 56 Me. 324; Bunn v. Markham, 7 Taunt. 224; Coleman v. Parker, 114 Mass. 30; Wing v. Merchant, 57 Me. 383; McWillie v. Van Vacter, 35 Miss., 428; Egerton v. Egerton, 17 N. J. Eq. 420; Michener v. Dale, 23 Pa. 59.

The application of these principles to the circumstances of the present case require the conclusion that the appellant acquired no title to the fund in controversy, by the indorsement and delivery of the certificate of deposit. The certificate was payable on demand; and it is unquestionable that a delivery of it to the donee, with an indorsement in blank, or a special indorsement to the donee, or without indorsement, would have transferred the whole title and interest of the donor in the fund represented by it, and might have been valid as a *donatio mortis causa.* * * *

But the actual transaction was entirely different. The indorsement, which accompanied the delivery, qualified it, and limited and restrained the authority of the donee in the collection of the money, so as to forbid its payment until the donor's death. The property in the fund did not presently pass, but remained in the donor, and the donee was excluded from its possession and control during the life of the donor. That qualification of the right, which would have belonged to him if he had become the present owner of the fund, establishes that there was no delivery of possession, according to the terms of the instrument, and that as the gift was to take effect only upon the death of the donor, it was not a present executed gift *mortis causa,* but a testamentary disposition. * * * It was, in substance, not an assignment of the fund on deposit, but a check upon the bank against a deposit, which, as is shown by all the authorities and upon the nature of the case, cannot be valid as a *donatio mortis causa,* even where it is payable *in præsenti,* unless paid or accepted while the donor is alive; how much less so, when, as in the present case, it is made payable only upon his death.

This view of the law was the one taken by the Circuit Court as the basis of its decree, in which we accordingly find no error. It is, accordingly, affirmed.[20]

PAGE v. LEWIS et al.

89 Va. 1, 15 S. E. 389, 37 Am. St. 848, 18 L. R. A. 170. 1892.

The facts are stated in the opinion.

FAUNTLEROY, J.—The petition of Legh R. Page, administrator of William A. Thomas, deceased, represents that, on the 4th of January, 1889, the said William A. Thomas died intestate, leaving an estate valued at some $225,000, of which some $20,000 was realty, $18,000 on deposit in the Planters' National Bank of Richmond, and the balance, represented by bonds, stocks, choses in action, and gold coin, deposited in a rented box in the vaults of the said bank. That on the 14th day of January, 1889, the county court of Henrico county, on the motion of the heirs-at-law of the said decedent, appointed William R. Quarles and Mann S. Quarles curators of the said estate, who immediately qualified as such, by giving bond in the penalty of $300,000, and entered upon the discharge of their duties. That on the 29th day of January, 1889, said Bettie Lewis, along with her husband, filed her bill in the chancery court of the city of Richmond, against the aforesaid curators, in which she asserted that said William A. Thomas, deceased, during his last illness, by gift *causa mortis*, gave her the keys to the tin box in the vault of the Planters' National Bank, above described, and with them all the property contained therein. That he gave her the pass-book showing the status of his account with said Planters' Bank for money placed on deposit therein, and with it gave to her the balance on deposit to his credit in said bank, amounting, as aforesaid, to some $18,000; and that he also gave to her several negotiable notes, aggregating less than $1,000, which he had with him at his residence at the time of his last illness. That, to this bill, the curators filed their joint demurrer and answer, denying the claim asserted by said Bettie Lewis; denying that said Thomas had attempted during his last illness to make a gift to the plaintiff of said property; and insist-

[20] See Childs' Personal Property, §§ 224, 228, 229.

ing that actual possession of the several subjects of this pretended donation had never come to or remained with the plaintiff; and that no possession, either actual or constructive, by her, at the joint residence of the donor and donee, could render valid the alleged gift, the same not being evidenced by deed or will. That on the 19th day of February, 1889, petitioner, Legh R. Page, was appointed administrator of the estate of said William A. Thomas, deceased, by the county court of Henrico county, and, as such, he filed his answer to the bill of said Bettie Lewis. * * * The cause was argued at great length, and on the 8th day of January, 1891, a decree was pronounced sustaining the claim of the said Bettie Lewis (as preferred in her bill) to all the personal estate of the said William A. Thomas, deceased, except the sum of $18,000, money on deposit in the Planters' National Bank, which was awarded to petitioner, as administrator aforesaid. From this decree the case is here on appeal.

The question raised in the controversy, and to be decided by this court, is, What constitutes a valid gift *causa mortis?* and whether the evidence adduced by the complainant comes up to the law's requirements to establish such a gift by the decedent, William A. Thomas, to the complainant Bettie Thomas Lewis, by and through the facts and circumstances detailed in the bill and attested by the proofs. * * *

Bettie Thomas Lewis, who before her marriage, was Bettie Thomas, is the only living child of the late William A. Thomas, a wealthy retired merchant, who, at the age of 70 years, and enfeebled by long sickness, departed this life intestate on the 4th day of January, 1889, at his residence, in or near the city of Richmond, possessed of a large estate of both real and personal property, but principally personality. He never married, but cohabited with a woman of half white blood, formerly his slave in the county of Pittsylvania, Va., by whom he was the father of two daughters, Bettie, and an older sister, Fannie, who married and died, soon after the late civil war, without issue. Bettie, 35 years of age when her father died, and Fannie were always recognized and acknowledged by William A. Thomas as his children. * * * Soon after the termination of the late war, he removed to Richmond to engage in business, and he purchased a small farm just outside the city limits for a home for himself and Bettie; and there they lived together for more than twenty years; she presiding at his table and over his household affairs, and administering to him in sickness and in health, nursing and caring for him with the constant assidui-

ties of a devoted and dutiful daughter, and he providing for her comfort and pleasure, in every conceivable form that lavish parental love and large means could suggest. He built the house in which they lived for her; and, according to her directions, he planned and furnished it. * * * He provided for her an intelligent, agreeable female living-companion in his house until her marriage to John H. Lewis; and, for many years previous and up to his death, Fannie Coles, an educated, intellectual woman, * * * was her household companion, friend, and roommate. * * *

There is in the record very much more testimony, equally strong, explicit, unimpeached, and uncontradicted, attesting the life-long, avowed and unwavering solicitude and purpose of this isolated old man to nourish tenderly while he lived and to provide for amply at his death, his devoted and faithful daughter Bettie, the only light of his long life, and the only love which quickened the emotions of his introverted and self-centered soul. * * *

The *factum* of the gift depends mainly upon the testimony of Fannie Coles, detailing the circumstances, actions, and accompanying statements of Mr. Thomas during the period of impending dissolution; and, if that testimony be credible, consistent, uncontradicted and corroborated by concomitant circumstances, it establishes, by legal and sufficient evidence, the gift, as a valid donation *mortis causa*, by William A. Thomas to the claimant, his daughter Bettie Lewis. * * * On Thursday, the 3d day of January, 1889, William A. Thomas was taken seriously ill, and he died in the early part of the night of Friday,—the next day. It was during that illness that he made to his daughter Bettie the gift which is the subject of controversy in this case, and to which the chancery court of the city of Richmond, upon the evidence adduced, has solemnly adjudged she is entitled by law.

The witness Fannie Coles says: "Mr. Thomas called Bettie to his bedside, and said, 'Bettie, I am a very sick man, I do not know what may happen;' and he said, 'Bettie, look into my pants' pocket, and bring me my keys, my penknives, my two purses, and look in the inside of my vest pocket, and bring me a package of papers tied with a red string.' She brought them to his bed to him, and he said, 'Bettie, I am going to give you these things as yours.' He gave her the keys to his top bureau drawer, and told her that in that drawer she would find two notes in a white envelope; to get these notes out of the drawer,—that they were hers. Then he opened a small black purse and took out a small package of white tissue paper. Out of this paper he took some keys, and he said, 'Bettie,

here are the keys to my safe at Drewry & Co's, and to the box I have in the vault of the bank.' He says, 'At Drewry & Co's, in the safe, you will not find anything of any great value, but whatever you find in that safe you can have. Now, Bettie, these keys that I now give you that belong to the box in the vault at the bank is where all my valuables are. Whatever you find in that box, you can have as yours; and, Bettie, whatever you do, don't let any one get these keys away from you on any pretense. Swing on to them as you would your life.' Then he took up his pocketbook, and gave it to her, and told her it had no great amount in the pocketbook, but it was hers. Then he took up the package of papers that was tied with a red string, and he said, 'Bettie, in this package you will find my bank book, showing you how much I have in bank. Whatever it calls for, you can have as yours, and in this package also you will find some notes. They will be money for you; you can have them also. Bettie, I wish you to take these papers, my purses, and my knives,—I give you these knives also,—and put them in your trunk. I don't want you to put them in my bureau, but put them between your clothes, for safe-keeping; for, Bettie, you will have to take care of these things now. I have been taking care of them all these years for you.'" * * *

After the conversation last detailed by the witness, Thomas became much worse late on Friday evening, and Dr. McGuire was again sent for. He arrived at eight o'clock that night, and left a little after eight. Thomas grew rapidly worse after the doctor left, and the witness Fannie Coles testifies, "that Thomas called Bettie and said to her, 'Oh, Bettie, I am a mighty sick man,—sicker than you have any idea about;' and he says, 'Bettie, where are those things I have given you?' She says, 'In my trunk, safe.' And he says, 'Bettie, where are your trunk keys?' And she said to him, 'I have got them in my bosom, here.' And he said, 'That is right, Bettie; keep your keys on your person.' And he says, 'Bettie, make sure of it again; I have given you everything I possess in this world.' He says, 'Fannie, you hear me give them to Bettie again, don't you?' I said, 'Yes, sir.' He says, 'Now, Fannie, remember.' And he said, 'Bettie, I am sicker than ever I was in my life.' And Bettie says, 'I shall send for the doctor.' He says, 'Oh, Bettie, I don't think he can do much good.' Then he turned to her, and he says, 'Oh, Bettie, remember, now, I have given you everything;' and he turned over and complained of a severe pain in his side, and in a few minutes he was dead." * * *

The testimony and the circumstances relied on by the appellant

to show that no such gift was made by Mr. Thomas as sworn to by Fannie Coles, and attested by corroborating facts, do not, we think, furnish a sufficient basis for even reasonable conjecture; much less to assure the guarded discretion of a court of justice. The circumstance that there is but one direct witness to the gift, competent to testify (the appellant declining to allow the donee as a witness when offered), does not affect the validity of the gift. One witness, if credible, is sufficient. The law does not require more than one; and especially, as in this case, when that one is not only unimpeached, but corroborated. Nor does the magnitude of the gift affect its validity. It may extend to the whole of the donor's personal estate. The law fixes no limit. In the case of Duffield v. Elwes, 1 Bligh, N. S. 497, the gift *causa mortis* was of the value of $165,000. In Hatch v. Atkinson, 56 Me. 327, 96 Am. Dec. 464, the court says: "The common law does not require the gift to be executed in the presence of any stated number of witnesses; nor does it limit the amount of the property that may thus be disposed of." Ward v. Turner, 1 White & T. Lead. Cas. Eq. pt. 2, p. 1251, note; 2 Schouler, Pers. Prop. 132-136.

The *factum* of the gift in this case being clearly and conclusively proved, as we think it indisputably has been, it only remains to state the law, and apply it to the facts proved. They show all the essential attributes or constituent elements of a *donatio mortis causa*, as defined by the law and established by the course of adjudication. The gift was made *in periculo mortis*, under the apprehension of death as imminent; and it was of personal property, such as, under the law, may be the subject of a gift *mortis causa*. Possession or delivery was made at the time of the gift; and the donor died of that illness in a few hours after the making of the gift. Thus the gift, inchoate, conditional, and defeasible when made, became absolute at the donor's death. Delivery is essential. It may be either actual, by manual tradition of the subject of the gift, or constructive, by delivery of the means of obtaining possession. Constructive delivery is always sufficient when actual, manual delivery is either impracticable or inconvenient. The contents of a warehouse, trunk, box, or other depository may be sufficiently delivered by delivery of the key of the receptacle. * * *

* * * The delivery of the keys to Bettie Lewis, with words of gift, by her father upon his deathbed, invested her with the same means of obtaining possession that Thomas had, and made her the owner, with title defeasible only by recovery or revocation of the donor, or by a deficiency of assets to pay creditors. * * * It

is contended that the gift was testamentary, because of the words in the affidavits of Bettie Lewis and Fannie Coles,—"were hers in case of his death;" "to be hers in case of his death." * * *

The cases in which gifts made in similar and identical language by dying donors have been held to be valid donations *mortis causa* are numerous; the principle being that the expression, "In case of my death it is yours," or like words, do not of themselves make a testamentary disposition, but merely express the condition which the law annexes to every donation *mortis causa.* * * *

* * * In the case of Basket v. Hassell, 107 U. S. 602, 27 L. Ed. 500, the decision turned alone on the construction and legal effect of the indorsement upon the certificate by the donor: "Pay to Martin Basket; * * * no one else; then not until my death." This was held to be a testamentary disposition; but in the opinion of the court, Mr. Justice Matthews says: "The certificate was payable on demand; and it is unquestionable that a delivery of it to the donee with an indorsement in blank, or a special indorsement to the donee, or without indorsement, would have transferred the whole title and interest of the donor in the fund represented by it, and might have been valid as a *donatio mortis causa.*"

It is contended that the gift by Thomas, in this case, was invalid because it comprised the bulk of his estate. The *jus disponendi* is the essential value and element of property, and the exercise of that right is commended in the beatitude, "It is more blessed to give than to receive." By the law of Virginia a person may make a dying disposition of all of his personal property, *donatio mortis causa;* and there is no limit as to the extent of the gift,—whatever of the whole or of the part,—*inter vivos* or *donatio mortis causa.* Such limitation can only be by express legislation, and the courts are invested with no such function. The Roman or civil law of *donationes mortis causa* did recognize the limitation or restriction; but the common law does not limit the amount, absolute or comparative, of the personal estate which may thus be disposed of. Michener v. Dale, 23 Pa. 59; Seabright v. Seabright, 28 W. Va. 481; Hatch v. Atkinson, 56 Me. 327, 96 Am. Dec. 464; White & T. Lead. Cas. Eq. pt. 2, p. 1251; 2 Schouler, Pers. Prop. 132-136.

* * * All the law-writers use the simple term "gift," when used without qualification, to express the "ordinary gift" or "simple gift" which transfers an absolute and irrevocable title to the donee, as contradistinguished from the extraordinary and technical gift *mortis causa,* which is made under the apprehension of impend-

ing death, and transfers only a conditional, defeasible, and revocable interest. The peculiar gift *mortis causa* is always designated by its special, technical name; and it is never understood or intended to be embraced or expressed by the term "gift," merely. A gift *mortis causa* is a very different thing from a "gift," in many essential particulars. * * * The disposition of personal property by *donatio mortis causa* has been a principle and practice of the common law, both in England and in the states of this Union, for centuries past; and although, since the day of Lord Hardwicke, there have been extrajudicial utterances in deprecation of it, it is to-day a fixed principle of enlightened jurisprudence in all civilized countries. It is the imperative function of the courts to interpret and operate the law as it is, not as they may think it ought to be.

In the able and elaborate opinion of Judge Leake, filed with the record in this case, he decided (saying "but certainly not without doubts," "the question to my mind is a very doubtful one") that the gift by Mr. Thomas of his bank book, showing the amount of his deposits in the Planters' National Bank, was ineffectual in law as a *donatio mortis causa* of the money to his credit in the said bank; and he decreed accordingly. In this, I am of the opinion the decree under review is erroneous, and that it should be, under the rule, in this particular, corrected in favor of the appellees, and in all other respects affirmed, but the majority of the court think the decree is wholly right, and that it must be affirmed as it is. Every species of personal property—in its largest sense—capable of delivery, actual or constructive, may be the subject of a valid gift *mortis causa,* including money, bank notes, stocks, bonds, notes, due bills, certificates of deposit, and any other written evidence of debt. Lee v. Boak, 11 Gratt. 182, and cases there cited; Elam v. Keen, 4 Leigh, 333, 26 Am. Dec. 322; 1 White & T. Lead. Cas. Eq. 1205; Duffield v. Elwes, 1 Bligh, N. S. 497; Grover v. Grover, 24 Pick. 265, 35 Am. Dec. 319. In the case of Coleman v. Parker, 114 Mass. 33, it is said: "This term 'delivery' is not to be taken in such a narrow sense as to import that the chattel or property is to go literally into the hands of the recipient, and to be carried away. There are many articles which might be made the subjects of a donation *mortis causa,* in which a manual delivery of that kind might be inconvenient or impracticable. We have no doubt that a trunk, with its contents, might be effectually given and delivered in such a case by a delivery of the key. * * *" In the case of Cooper v. Burr, 45 Barb. 9, it is said: "The situation, relation, and circumstances of the parties, and of the subject of the gift, may be

taken into consideration in determining the intent to give, and the fact as to delivery. A total exclusion of the power or means of resuming possession by the donor is not necessary." In Elam v. Keen, 4 Leigh, 335, 26 Am. Dec. 322, Judge Carr said: "There are many things of which actual, manual tradition cannot be made, either from their nature or their situation at the time. It is not the intention of the law to take from the owner the power of giving these. It merely requires that he shall do what under the circumstances will in reason be considered equivalent to an actual delivery." In Hatch v. Atkinson, 56 Me. 324, 96 Am. Dec. 464, the court said that delivery must be as complete "as the nature of the property would admit of." See Wing v. Merchant, 57 Me. 383; Dole v. Lincoln, 31 Me. 422; Hillebrant v. Brewer, 6 Tex. 45, 55 Am. Dec. 757; Noble v. Smith, 2 Johns. 52, 3 Am. Dec. 399; Jones v. Brown, 34 N. H. 445; Marsh v. Fuller, 18 N. H. 360. In Stephenson v. King, 81 Ky. 425, 50 Am. Rep. 173, the court, referring to the case of Ashbrook v. Ryon, as to the bank book, says. "What evidence the pass-book contains of the deposit in that case does not appear. If an ordinary pass-book (and it must be so inferred), it was an acknowledgment by the bank that the donor had to his credit in the bank that much money; and when actually delivered, we cannot see why it did not pass the right." Suppose Mr. Thomas, instead of having certificates of deposits made and entered by the bank in his bank book, had taken a separate receipt or certificate of deposit for each deposit at the time it was made. Would not the delivery, with words of gift of each one, of such receipts or certificates of deposit have been as effectual in law to pass the title to his money in bank as the delivery of the letter in Stephenson v. King, or the attorney's receipt for claims in his hands for collection in Elam v. Keen? Mr. Thomas' bank book had just been written up or balanced by the bank and it showed on its face the balance due to him by the bank. It was the bank's acknowledgment of indebtedness to Thomas, and the only voucher or evidence which he had, upon which the law implies a promise to pay; and it was transferable by delivery without writing, like any other chose in action. It passed the equitable title, and that is sufficient. The "beneficial owner" of any chose in action may sue upon it in his own name. Va. Code 1887, § 2860. There is a difference between a savings bank pass-book and an ordinary bank book, in that by a special method and agreement, on the mere presentation of the savings bank pass-book, the bank will pay, but this is the mere special mode of dealing agreed on by the parties in that case; and,

though the bank would have the right to require evidence to satisfy it that Mr. Thomas had duly delivered, with words of gift sufficient in law to transfer his title to his money in the bank to his donee, Bettie Lewis, his daughter, yet that would not, any more than in the case of the keys, affect her title and right to demand the money, which the law would enforce.

We have given to this case elaborate consideration and the closest scrutiny; and upon the law and the facts, our judgment is to affirm the decree of the Chancery Court of the city of Richmond.[21]

Lacy, J., dissents.

CHECK.

FOXWORTHY v. ADAMS et al.

136 Ky. 403, 124 S. W. 381, 27 L. R. A. (N. S.) 308. 1910.

The facts are stated in the opinion.

CLAY, C.—T. S. Foxworthy died, testate, in Nelson county, Kentucky, on July 10, 1907, aged eighty-seven years. His first wife, Nancy Foxworthy, died many years ago. About eleven years prior to his death, he married appellant, who was then Minnie Fitzgerald. T. S. Foxworthy had no children by either wife. * * *

For almost two years prior to his death, the testator was confined to his house, and nearly all the time to his bed. During that time he required constant nursing and attention. This duty fell upon his wife. The testimony shows that it was well and faithfully performed. * * * Dr. Charles McClure, a nephew of his first wife and a very close neighbor, gave him much medical attention during this period as his condition required. The evidence shows that he, too, was faithful and attentive, and made frequent visits to the home of the testator. On March 19, 1907, the testator drew a check on the People's Bank of Bardstown, Kentucky, for the sum of $500, payable to the order of appellant, Minnie Foxworthy. On March 20, 1907, a second check was drawn on the same bank for a similar amount, payable to the order of Charles McClure, the

21 See Childs' Personal Property, §§ 222, 224, 225, 229.
See Apache State Bank v. Daniels, 32 Okla. 121, 121 Pac. 237, 40 L. R. A. (N. S.) 901.

physician who attended him. The evidence tends to show that the body of each of these checks was written by Dr. McClure, and the testator's name was signed thereto by his wife. It further appears, however, that she frequently, at the direction of the testator, signed his name to checks.

On March 22, 1907, J. C. Abell, a neighbor and close friend of the testator, who frequently assisted him in the transaction of his business, wrote, at the request of the testator, the following paper:

March 22d, '07.

I this day give to my wife, Minnie F. Foxworthy, and Dr. Charles, each a check for $500 payable out of my estate after my death. It being my desire to make each of them a present for their close attention to me during my sickness; not having the ready cash on hand I take this method, as it is my desire that they shall each receive the above amount. $180.05 was due Dr. McClure on acct. to date. The balance, $319.95, I give to him as a present.

T. S. FOXWORTHY.

Witness: JAS. C. ABELL.

This paper was signed by T. S. Foxworthy, and his signature witnessed by J. C. Abell. This writing, together with the checks, was given to Abell by the testator to keep. The next morning the testator sent for Abell and told him to bring the checks back to him, but also stated that if he met Dr. McClure to deliver the latter his check. This Abell did. He then returned the other check to Foxworthy, who gave it to his wife in Abell's presence. The dictated writing of March 22, 1907, Abell kept until after the testator's death, the testator having directed him so to do. On the 20th day of February, 1907, some five months prior to his death, the testator, who then held a note on J. C. Abell for $1,000, dated May 29, 1906, due one day after date, bearing interest from date, requested Abell, who happened to be at his home, to write upon the note the following indorsement: "I this day assign the principal of this note to my wife, Minnie Foxworthy, and the interest I am to have until my death, this February 20th, 1907. Should I outlive my wife, then it to remain a part of my estate." Abell then wrote the above assignment upon the note in question. The testator signed his name below the assignment, and Abell thereupon signed his name as witness.

On August 12, 1907, Mrs. Foxworthy qualified as the testator's executrix. On that day certain indebtedness to the estate was paid.

Out of this indebtedness, the two $500 checks, made to Minnie Foxworthy and Dr. McClure, were satisfied and paid. On December 12, 1907, she made a partial settlement as executrix, and was credited by the two $500 checks. On May 8, 1908, she made final settlement with the county court. On June 8, 1908, Martha Adams and others, as legal heirs of the testator, filed exceptions in the Nelson county court to said two credits of $500 each, and also claimed that she should be charged with the Abell note of $1,000 and interest, as part of the testator's estate for which she had not accounted in her settlements. On the trial of these exceptions, evidence was heard and reduced to writing, and signed by the county judge, and made a part of and filed with the settlements. The county court surcharged the settlement by striking out the two credits of $500 each, and holding that the executrix should account as such for the Abell note. On appeal to the Nelson circuit court, the chancellor held that the executrix was entitled to credit for the two checks, but must account for the Abell note and interest. From this judgment the executrix has appealed, and Martha Adams and others have prosecuted a cross appeal.

We shall first discuss the propriety of the court's action with reference to the two checks. The rule is that a gift of one's own check is incomplete until the check has been paid or accepted by the bank. "A check, being a mere order or authority to the payee to draw the amount called for, when given without consideration, may be countermanded or revoked by the maker so long as it remains unacted on in the hands of the payee. Until payment or acceptance, there is not a complete delivery of the subject-matter such as is essential to constitute a valid gift." 14 Am. & Eng. Enc. Law, 2d ed. p. 1030. In the case of Throgmorton v. Grigsby, 124 Ky. 512, 99 S. W. 650, it was held that the issuance and delivery of a check for the purpose of a gift is not a delivery of the money, so that, the check not having been paid or accepted by the drawee, the gift is not completed, and therefore the drawer cannot be considered as holding the money as trustee for the payee. In the case before us, the checks were made immediately payable, but they were delivered subject to the terms of the written memorandum handed to Abell. Appellant and Dr. McClure accepted the checks upon those terms. By such terms the checks were not even payable until after the death of the maker. It is perfectly plain, therefore, that the checks were not good as a gift *inter vivos*.

But it is insisted by counsel for appellant that the checks have sufficient consideration to support them, and are therefore collect-

able as other contracts, no matter how denominated by the maker. * * * It is the duty of husband and wife to attend, nurse, and care for each other when either is unable to care for himself. * * * We therefore conclude that neither the check itself, nor the services which appellant performed, created any obligation against the estate of the testator.

A different question is presented in the case of the check to Dr. McClure. It is shown that, prior to the execution of the check, he had performed medical services of the value of $180.05. * * * There is proof in the record to the effect that the check was actually given in payment of the services theretofore rendered and of the services thereafter to be rendered. * * * We therefore conclude that, as the check to Dr. McClure is supported by sufficient consideration, appellant is entitled in her settlement to be credited with the amount thereof.

We next come to a consideration of the Abell note. Did the assignment and delivery of the note constitute a valid gift *inter vivos?* The rule is that, to constitute a valid "gift *inter vivos,*" there must be a gratuitous and absolute transfer of the property from the donor to the donee, taking effect immediately, and fully executed by a delivery of the property by the donor and acceptance thereof by the donee. Gifts *inter vivos* have no reference to the future, but go into immediate and absolute effect. * * *

* * * We therefore conclude that the assignment and delivery of the Abell note did not constitute a valid gift *inter vivos.*

The judgment is affirmed on the original appeal, and reversed on the cross appeal.[22]

VARLEY v. SIMS.

100 Minn. 331, 111 N. W. 269, 117 Am. St. 694, 8 L. R. A. (N. S.) 828. 1907.

The facts are stated in the opinion.

BROWN, J.—The facts in this case are as follows: On November 29, 1904, Mrs. C. H. Brown, the mother of the plaintiff, had on deposit in the First National Bank of Grand Rapids, this state, subject to check, the sum of $1,168.30. She was on that date at the

[22] See Childs' Personal Property, § 224.

home of her sister, a Mrs. Wright, at West Allis, Wisconsin, and about to undergo a serious surgical operation. In view of the operation and the probability of death resulting therefrom, she drew her check on the Grand Rapids bank for the entire amount of her deposit therein, payable absolutely to plaintiff, and left the same with Mrs. Wright, instructing her to deliver it to plaintiff, who was not then present, in the event the operation resulted fatally. She also stated to her sister that, if she survived the operation the check should be returned to her. Thereafter the operation was performed, and Mrs. Brown never regained consciousness, but died. Plaintiff was notified of the facts but was unable to reach his mother before her death and the check was not delivered to him until after that event. He subsequently presented it to the bank, but payment was refused. Defendant was appointed administrator of Mrs. Brown's estate, and the bank paid the money to him. Plaintiff thereafter brought this action to recover the same from the administrator, on the ground that the delivery of the check, under the circumstances stated, constituted a valid gift *causa mortis* to him of the funds in the bank. The cause was tried below without a jury, resulting in judgment for plaintiff, from which defendant appealed.

This brings us to the principal question in the case, viz., whether a bank check, unaccepted by the bank, constitutes a transfer to the payee, of either the legal or equitable title to the funds to which it is subject, sufficient to sustain a gift *causa mortis*. The validity of gifts of bank deposits, evidenced by checks, or by the delivery of pass books or certificates of deposit, has been before the courts in numerous cases. It is held in a majority of the states of this country, and perhaps the same rule prevails in England, that an ordinary check upon a bank for a part only of the drawer's deposit, unaccepted by the bank before the death of the donor, is ineffectual as a gift *causa mortis*, for the reason, among others, that the check does not operate to pass to the donee either the legal or the equitable title to the funds in the bank; in other words, that the unaccepted check is not, either in law or equity, an assignment of the funds. But a strong and vigorous minority hold that, where the intention to make a gift is free from doubt, and no question of fraud or the rights of creditors is involved, the delivery of a check for a part or the whole of the deposit is sufficient, though not presented for payment until after the death of the donor. The courts so holding proceed upon the theory that the passing of a present legal title is not essential to a valid gift, that an equitable title is sufficient, and that such a title becomes vested in the donee at the time the check

is delivered, and becomes absolute on the death of the donor. That an equitable title is sufficient in such cases is supported by a long list of authorities. Druke v. Heiken, 61 Cal. 346, 44 Am. Rep. 553; Stephenson v. King, 81 Ky. 425, 50 Am. Rep. 173; Ellis v. Secor, 31 Mich. 185, 18 Am. Rep. 178; Ridden v. Thrall, 125 N. Y. 572, 11 L. R. A. 684, 21 Am. St. Rep. 758, 26 N. E. 627; Meach v. Meach, 24 Vt. 591; Basket v. Hassell, 107 U. S. 602, 27 L. Ed. 500, 2 Sup. Ct. Rep. 415. An examination of some of the reported decisions where gifts of money on deposit in banks have been made by delivery of a pass book or unindorsed certificate of deposit discloses a disposition on the part of the courts generally to sustain them where the intention of the donor is clear, and there is no fraud, and the rights of creditors are not involved. In the case of Sheedy v. Roach, 124 Mass. 472, 26 Am. Rep. 680, the court held that a deposit in a savings bank might be the subject matter of a gift *causa mortis*, and the gift established by proof of the delivery of the pass book accompanied by an assignment to the donee, though the bank was not informed of the gift until after the death of the donor. In Conner v. Root, 11 Colo. 183, 17 Pac. 773, the court held that a certificate of deposit might be the subject of a gift *causa mortis*, and, if delivered to a third person for the use of the donee, the title passed upon the occurrence of death, though the certificate was payable to the donor's order and was not indorsed by her. In McGuire v. Murphy, 107 App. Div. 104. 94 N. Y. Supp. 1005, the court held that there was a sufficient delivery of a bank deposit where the pass book and an order on the bank for the payment of the amount to the donee is delivered to him, though the donor die before presentation to the bank. In the case of Polley v. Hicks, 58 Ohio St. 218, 41 L. R. A. 858, 50 N. E. 809, the court held that the delivery of a deposit book issued by a savings bank, accompanied by words of gift, is sufficient to constitute a gift *causa mortis*. Other cases along this same line might be cited without number, but it is unnecessary.

The courts holding that the delivery of a pass book or certificate of deposit is sufficient, distinguish that class of cases from those where a mere check is delivered to the donee for a part of the fund. McGuire v. Murphy, *supra*. The substantial element of distinction, as we gather from reading the cases, is that in the case of a check there is no legal or equitable transfer or assignment of the bank funds to the donee. Whether the distinction has any logical foundation is, we think, an open question. Of course, as already suggested, to render a gift of this sort valid, title to the thing given must pass to the donee. Whether any title passed to plaintiff by the

check in question depends upon the further inquiry whether the check operated, unaccepted by the bank, as an assignment. Upon the general proposition whether such is the legal effect of a check, considered generally and not with reference to gifts, the authorities are in hopeless conflict. The great majority of courts maintain the doctrine that such a check, unaccepted by the bank, does not operate either as a legal or an equitable assignment, because there is no privity of contract between the holder or payee and the bank. 4 Cyc. Law & Proc. p. 49, and cases cited. Other courts insist, and upon broad grounds, that a check is in equity an assignment, and operates, as between the drawer and the payee, as a transfer *pro tanto.* This view of the law is sustained by the courts of Illinois, Iowa, Kentucky, Nebraska, Pennsylvania, South Carolina and Wisconsin. The privity of relation between the payee and the bank is found in the implied obligation of the latter to pay the funds deposited to whomsoever and whenever the depositor may direct. The authorities, as well as the merits of the question, are thoroughly discussed in a valuable note to Loan & Sav. Bank v. Farmers' & M. Bank, 63 Cent. L. J. 451, and referred to in a general way in Northern Trust Co. v. Rogers, 60 Minn. 208, 51 Am. St. Rep. 526, 62 N. W. 273. The precise question has never been determined by this court, and its solution is not necessary in this case. It is probable that the reasoning of those courts holding to the position that a check operates, between the parties, as an assignment *pro tanto,* is the better law, and should be adopted, yet the question is not free from doubt, and, not being involved, we pass it without discussion. In the case at bar, the check relied upon by plaintiff was for the entire amount of the deposit and in such cases the authorities are nearly uniform that an assignment of the whole fund results therefrom. Brady v. Chadbourne, 68 Minn. 117, 70 N. W. 981; Hill v. Escort, (Tex. Civ. App.), 86 S. W. 367; May v. Jones, 87 Iowa, 188, 54 N. W. 231; Kimball v. Leland, 110 Mass. 325; Hawes v. Blackwell, 107 N. C. 196, 22 Am. St. Rep. 870, 12 S. E. 245; Pease v. Landauer, 63 Wis. 20, 53 Am. Rep. 247, 22 N. W. 847; Mandeville v. Welch, 5 Wheat. 277, 5 L. Ed. 87; Walker v. Mauro, 18 Mo. 564.

This principle is conceded by counsel for appellant, but he contended on the argument, with much earnestness, that it has no application to a check made the basis of a gift *causa mortis;* that the rule that an ordinary check for the whole of a fund operates as an assignment from the drawer to the payee applies only to checks given for a valuable consideration. There is authority for this contention. Pullen v. Placer County Bank, 138 Cal. 169, 94

Am. St. Rep. 19, 66 Pac. 740, 71 Pac. 83. But the reasoning upon which the decisions so holding are founded is not sound. Gifts in anticipation of death require no consideration to support them. They are sustained by the courts upon the same principle that all intentional gratuities are upheld. The law supplies a consideration by intendment, and gives force to the intention of the donor, and a gift stands upon an equality with a contract founded upon a valuable consideration. The same legal principle surrounds and upholds the check designed as a gift and that given for value received. Recent authorities sustain this view of the law. Phinney v. State, 36 Wash. 236, 68 L. R. A. 119, 78 Pac. 927; Taylor's Estate, 154 Pa. 183, 18 L. R. A. 855, 25 Atl. 1061. See also a valuable discussion of the general question in 60 Cent. L. J. 244, and Murphy v. Bordwell, 83 Minn. 54, 52 L. R. A. 849, 85 Am. St. Rep. 454, 85 N. W. 915. It is unnecessary that the check in such cases distinctly state on its face that it covers the entire fund. The fact that it does may be shown by proof on the trial. 4 Cyc. Law & Proc. p. 53, and cases cited; 2 Dan. Neg. Inst. 1643.

It follows from what has been said that the conclusion reached by the learned trial court was in harmony with the legal rights of the parties, and the judgment appealed from is affirmed.[23]

REVOCATION.

DORAN v. DORAN.

99 Calif. 311, 33 Pac. 929. 1893.

The facts are stated in the opinion.

BELCHER, C.—On the 30th day of June, 1887, John Doran was the owner of a certain lot of land in the city of San Francisco, and

[23] See Childs' Personal Property, §§ 224, 229.

The delivery of a savings bank book constitutes a valid gift of the funds represented thereby. Ridden v. Thrall, 125 N. Y. 572, 26 N. E. 627, 21 Am. St. 758, 11 L. R. A. 684.

The maker's own note, being but a promise to pay, does not constitute a valid gift. Conrad et al. v. Manning et al., 125 Mich. 77, 83 N. W. 1038; Graff v. Graf, 150 Ky. 226, 150 S. W. 58.

Note of third person may be valid gift. Royston v. McCulley, (Tenn. Ch. 1900) 59 S. W. 725, 52 L. R. A. 899.

Parol gift of land, followed by possession and the making of valuable improvements thereon, is valid. Bevington v. Bevington et al., 133 Iowa 351, 110 N. W. 840, 9 L. R. A. (N. S.) 508.

of $770, money on deposit to his credit in the Hibernia Savings & Loan Society of San Francisco. On that day he executed to the defendant, James Doran, a deed of the lot and an assignment in writing of the pass book showing the amount to his credit in the said bank. John and James were brothers, and the sons of the plaintiff. The plaintiff seeks by this action to have a trust declared in her favor as to the real and personal property so transferred. * * * The case was tried by the court, and the findings were, in effect, that the said conveyance and assignment were absolute, and were not made by reason of any confidence John had in defendant, nor upon any promise of defendant to reconvey the lot to John, or to hold the money for his use, nor upon any promise, in the event of John's death, to convey the lot or pay over any part of the money to the plaintiff. Judgment was accordingly entered that plaintiff take nothing by the action, and that defendant recover from her his costs and disbursements therein. From this judgment, and an order denying her motion for new trial, the plaintiff appeals.

The only point made for reversal which need be noticed is that the findings were not justified by the evidence. The proceedings at the trial are briefly stated in the record as follows: Plaintiff introduced in evidence the deed and pass book in question; the deed expressed a nominal consideration, and the pass book, numbered 108,800, showing a balance to the credit of the depositor of $770. "Proof was then made that on June 30, 1887, John Doran was lying dangerously ill at St. Mary's Hospital, San Francisco, and expressed a desire to settle his affairs; that the sick man knew that his mother, Margaret Doran, the plaintiff, was his heir at law; that, for the purpose of avoiding the expense and delay of probate proceedings, John determined to transfer all his property in trust; that he was aware of the risk he ran in making such transfer, but declared that he would make his brother, James, the defendant, his trustee, knowing that his said brother would do what was right; that thereupon John conveyed to defendant the aforesaid lot of land on Jersey street, and assigned to said defendant the said pass book No. 108,800. It was also proven that John Doran died on the 5th day of July, 1887, intestate, unmarried, and without issue, and that his father had predeceased him. The defendant, James Doran, testified in substance: "I am defendant in this action. John Doran died on or about the 5th day of July, 1887. He was my brother. The plaintiff, Margaret Doran, is my mother, and mother of deceased. My father is dead. My brother, John, was never married. I was present when John made the transfer of the lot on Jersey

street and the Hibernia Bank pass book. What my brother meant when he said I would do what was right was that I would reconvey the property to him if he recovered from his then sickness. Nothing further was said by John on the subject. On the morning of the day of his death, John said to me he was feeling awful bad; that he thought he was going to die; that I should hurry down to the Hibernia Bank, and get out his money, and bring it up to him. I went accordingly to the bank, and drew out his money. I was scarcely absent more than 15 minutes, but when I got back John was dead." * * *

Upon this record of the evidence we do not think the findings in relation to the real property can be disturbed. An express trust in real property can only be created or declared by a written instrument subscribed by the trustor or trustee. Civil Code, § 852. There was therefore no express trust in favor of the grantor or the plaintiff, and no facts are stated from which a trust by operation of law must necessarily arise in her favor. So far as appears, the conveyance was made by the grantor of his own motion, and without any solicitation, undue influence, or fraud on the part of the grantee; and it may have been intended to be absolute in case of the grantor's death, and to vest the title in fee simple in the grantee; and that it was so intended must, in view of the findings, be presumed.

As to the bank account the law is different. An express or implied trust in relation to personal property may be declared and proved by parol (Hellman v. McWilliams, 70 Cal. 449, 11 Pac. Rep. 659; Perry, Trusts, § 86): and here the undisputed evidence on the part of the plaintiff shows that the pass book was assigned to the defendant in trust for the assignor. The respondent, however, contends that the assignment and delivery to him of the pass book constituted a complete gift of the money *causa mortis*. Conceding this to be so, still a gift *causa mortis* may be revoked by the donor at any time during his life, and without the consent of the donee. Civil Code, § 1151; Daniel v. Smith, 64 Cal. 349, 30 Pac. Rep. 575; Merchant v. Merchant, 2 Bradf. Sur. 432; Parker v. Marston, 27 Me. 196. Here the respondent's own testimony very clearly shows that the gift, if made, was revoked by the donor before he died. He testified that, on the morning of the day of his death, John told him to "hurry down to the Hibernia Bank, and get out his money, and bring it up to him. I went accordingly to the bank, and drew out his money; * * * but when I got back John was dead." This plainly indicates that John still claimed the money as his own, and intended to again take it into his possession. Under these circum-

stances it must be held that the respondent held the money in trust and as a part of the estate of John, and that the plaintiff, as the only heir of John, had a right to have the trust enforced, and the money paid over to her.

We advise that the judgment and order, so far as they relate to the real property, be affirmed, and that, so far as they relate to the money, be reversed, and the cause remanded for a new trial.

We concur: SEARLS, C.; TEMPLE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order, so far as they relate to the real property, are affirmed, and, so far as they relate to the money, are reversed, and the cause remanded.[24]

[24] See Childs' Personal Property, § 229.

CHAPTER IX.

TRANSFER OF PROPERTY BY OPERATION OF LAW.

ACCESSION.

Definition—Nature of.

BLACKWOOD TIRE & VULCANIZING CO. v. AUTO STORAGE CO.

133 Tenn. 515, 182 S. W. 576, 1916 E. (L. R. A.) 254. 1916.

The facts are stated in the opinion.

NEIL, C. J.—The defendant sold an automobile to one Cooper, retaining title. Thereafter Cooper bought from the plaintiff, and had fitted to the machine certain tire casings; plaintiffs not retaining title. After this, the machine not having been paid for, the defendant retook possession, and sold it in the usual way; the tires furnished by plaintiffs still remaining on the machine. Cooper made no claim to the tire casings when defendant retook the machine, and made no objection to the sale. After the sale, however, at the instance of plaintiff, Cooper sold, or purported to sell, these tire casings to the plaintiff; their value at that time to be credited against the charge which plaintiff had made against Cooper when these tire casings were furnished. On this alleged title plaintiff brought its suit against defendant and replevied the tire casings. The trial court dismissed the suit, and subsequently on appeal the Court of Civil Appeals affirmed this judgment. We think both courts were correct.

The controversy arises under the law of accession. As said in Ruling Case Law, vol. 1, p. 117:

"The word 'accession' is used broadly in the language of the law to signify the right which an owner of corporeal property, real or personal, has to any increase thereof from any cause, either natural or artificial. In this sense it is broad enough to include

additions to the value of land by buildings, fences, etc., erected on it, a gradual deposit of soil by the action of water, value added to chattels by labor performed, the increase of animals, or any other mode by which additions to property are made. As a term of legal classification, however, accession is generally employed to signify the acquisition of title to personal property by its incorporation into or union with other property. * * *

"The general rule of the common law in regard to title by accession is that, whatever alteration of form has taken place in personal property, the owner is entitled to such property in its state of improvement, unless the identity of the original materials has been destroyed, or unless the thing has been annexed to, and made part of, some other thing which is the principal, or its nature has been changed from personal to real property, but if the thing itself, by such acquisition, is changed into a different species, it belongs to the new operator, who has only to make satisfaction to the former proprietor for the materials which he has so converted."

The proposition contained in the last clause of the authority quoted seems not, however, to apply in favor of a willful trespasser.

As between mortgagor and mortgagee, the rule is that repairs made by the former, or at his instance, become a part of the property, and go wtih it, and inure to the benefit of the mortgagee. In Southworth v. Isham, 5 N. Y. Super. Ct. (3 Sandf.) 448, it appeared that a mortgagor of a vessel removed the old sails, which were worn out, and put on new ones, and then the vessel passed into the possession of the mortgagee. It was held that the new sails passed, as in case of repairs, and that the mortgagor could not maintain trover for the sails. In that case the court quoted with approval the following passage from the opinion in the case of Holly v. Brown, 14 Conn. 266:

"If during the term of a mortgage upon a printing establishment, the types and other materials belonging to it are removed, and new ones supplied in their place, if the new types and materials were procured for the purpose of replenishing the establishment mortgaged, and of supplying the place of articles belonging to it, which had been lost or destroyed by use, and were attached to and incorporated with it, they would become a part of the establishment, and by right of accession belong to the owners of it. They would form an incident to, and follow the title of, the printing establishment, to which they were attached, which would be the principal thing. As if the borrower of a watch should replace

its crystal, or of a musical instrument one of its strings, keys, or pipes, which had been lost, destroyed, or become useless in his service, in which case they would belong to the lender."

In *ex parte* Ames, Fed. Cas. No. 323 (1 Low. 561), it was held that, where a mortgage was made in Massachusetts on an unfinished locomotive, the mortgagee could hold, by accession, the additions afterwards made by the mortgagor before his bankruptcy. * * *

In Comins v. Newton, 92 Mass. (10 Allen) 518, it was held that a rifle having a skeleton stock at the time a mortgage was made on it was not so substantially changed by having a new wooden stock, and a new and different kind of lock substituted for the original by way of repair, as to terminate the lien of the mortgage. * * *

In the case before the court it is to be noted that the plaintiff in error sold the tire casings outright, to Cooper, and he permitted these casings to go with the machine into the hands of the defendant in error without objection, and in like manner permitted the sale of the machine with the tire casings attached, and never attempted to retake these casings until later, and then in furtherance of the effort of the plaintiff in error to regain them, and that for this purpose he endeavored to make sale of them at that time to the plaintiff in error. We think it must be laid down as a general principle that the mortgagor, in making repairs on property which he has mortgaged, must be held, in the absence of some distinct evidence to the contrary, to have intended such repairs as a fixed improvement to such property, since the amelioration inures not only to the benefit of the mortgagee, but to his own benefit as well, in the enhancement of the value of his property, to the end that it may go further toward relieving him of the mortgage debt in case sale should be made.

In the case before us, not only was Cooper subject to the presumption indicated, but his acts in permitting the machine to go back into the hands of defendant in error, without objection on the subject of the tire casings, and to be sold in like manner, indicate as a fact that it was his purpose to make a fixed addition to the property. The plaintiff in error, acquiring his title from Cooper, must stand in his shoes.

In what has been said we have assumed that a sale of personal property with title retained to secure the purchase price would, in respect of the matter in hand, be governed by the same principles that would control a mortgage, and we so hold. At least in such sales the title retained is but a form of lien. * * *

On the grounds stated, we are of the opinion that the judgment of the Court of Civil Appeals, sustaining that of the trial court dismissing the action of the plaintiff in error, must be affirmed.[1]

WILFUL TRESPASSER.

SILSBURY & CALKINS v. McCOON & SHERMAN.

3 N. Y. 379, 53 Am. Dec. 307. 1850.

Action of trover for a quantity of whisky.

[The facts appear to be that on February 18, 1842, the sheriff levied upon 500 bushels of grain owned and then in the distillery of one Wood, the grain having been purchased by Wood for the purpose of making it into whisky. The grain was not removed by the sheriff. Shortly after, the plaintiffs came into possession of the distillery, and manufactured the grain into whisky. When the sheriff came to sell the grain, he was informed by the plaintiffs that they had made the grain into whisky, and that they were willing to pay for it, but no agreement was reached concerning the matter at the time. Later, the sheriff accepted the plaintiffs' note for the value of the grain, the price agreed upon being fifty cents per bushel. On February 25, 1843, the sheriff's deputy levied upon and sold the whisky in question, the defendants being the purchasers.

Verdict for the plaintiffs and the defendants appealed.]

RUGGLES, J.—It is an elementary principle in the law of all civilized communities, that no man can be deprived of his property, except by his own voluntary act, or by operation of law. The thief who steals a chattel, or the trespasser who takes it by force, acquires no title by such a wrongful taking. The subsequent possession by the thief or the trespasser is a continuing trespass; and if during its continuance, the wrongdoer enhances the value of the chattel by labor and skill bestowed upon it, as by sawing logs into boards, splitting timber into rails, making leather into shoes, or iron into bars, or into a tool, the manufactured article still belongs to the owner of the original material, and he may retake

[1] See Childs' Personal Property, § 278.

it or recover its improved value in an action for damages. And if the wrongdoer sell the chattel to an honest purchaser having no notice of the fraud by which it was acquired, the purchaser obtains no title from the trespasser, because the trespasser had none to give. The owner of the original material may still retake it in its improved state, or he may recover its improved value. The right to the improved value in damages is a consequence of the continued ownership. It would be absurd to say that the original owner may retake the thing by an action of replevin in its improved state, and yet that he may not, if put to his action of trespass or trover, recover its improved value in damages. Thus far, it is conceded that the common law agrees with the civil.

They agree in another respect, to-wit, that if the chattel wrongfully taken, afterwards come into the hands of an innocent holder, who believing himself to be the owner, converts the chattel into a thing of different species so that its identity is destroyed, the original owner cannot reclaim it. Such a change is said to be wrought when wheat is made into bread, olives into oil, or grapes into wine. In a case of this kind the change in the species of the chattel is not an intentional wrong to the original owner. It is therefore regarded as a destruction or consumption of the original materials, and the true owner is not permitted to trace their identity into the manufactured article, for the purpose of appropriating to his own use the labor and skill of the innocent occupant who wrought the change; but he is put to his action for damages as for a thing consumed, and may recover its value as it was when the conversion or consumption took place.

There is great confusion in the books upon the question what constitutes change of identity. In one case (5 Hen. 7, fol. 15), it is said that the owner may reclaim the goods so long as they may be known, or in other words, ascertained by inspection. But this in many cases is by no means the best evidence of identity; and the examples put by way of illustration serve rather to disprove than to establish the rule. The court say that if grain be made into malt, it cannot be reclaimed by the owner, because it cannot be known. But if cloth be made into a coat, a tree into squared timber, or iron into a tool, it may. Now as to the cases of the coat and the timber they may or may not be capable of identification by the senses merely; and the rule is entirely uncertain in its application; and as to the iron tool, it certainly cannot be identified as made of the original material, without other evidence. This illustration, therefore, contradicts the rule. In another

case (Moore's Rep. 20), trees were made into timber and it was adjudged that the owner of the trees might reclaim the timber, "because the greater part of the substance remained." But if this were the true criterion it would embrace the cases of wheat made into bread, milk into cheese, grain into malt, and others which are put in the books as examples of a change of identity. Other writers say that when the thing is so changed that it can not be reduced from its new form, to its former state, its identity is gone. But this would include many cases in which it has been said by the courts that the identity is not gone; as the case of leather made into a garment, logs into timber or boards, cloth into a coat, etc. There is, therefore, no definite settled rule on this question; and although the want of such a rule may create embarrassment in a case in which the owner seeks to reclaim his property from the hands of an honest possessor; it presents no difficulty where he seeks to obtain it from the wrongdoer; provided the common law agrees with the civil in the principle applicable to such a case.

The acknowledged principle of the civil law is that a wilful wrongdoer acquires no property in the goods of another, either by the wrongful taking or by any change wrought in them by his labor or skill, however great that change may be. The new product, in its improved state, belongs to the owner of the original materials, provided it be proved to have been made from them; the trespasser loses his labor, and that change which is regarded as a destruction of the goods, or an alteration of their identity in favor of an honest possessor, is not so regarded as between the original owner and a wilful violator of his right of property.

These principles are to be found in the digest of Justinian (Lib. 10, tit. 4, leg. 12, Par. 3). "If any one shall make wine with my grapes, oil with my olives, or garments with my wool, *knowing they are not his own,* he shall be compelled by action to produce the said wine, oil, or garments." So in Vinnius' Institutes, tit. 1, pl. 25. "He who knows the material is another's ought to be considered in the same light as if he had made the species in the name of the owner, to whom also he is to be understood to have given his labor."

The same principle is stated by Puffendorf in his Law of Nature and of Nations (b. 4, ch. 7, Par. 10), and in Wood's Institutes of the civil law, p. 92, which are cited at large in the opinion of Jewett, J., delivered in this case in the supreme court (4 Denio 338), and which it is unnecessary here to repeat. In Brown's Civil and Admiralty Law, p. 240, the writer states the civil law

to be that the original owner of any thing improved by the act of another, retained his ownership in the thing so improved, unless it was changed into a different species; as if his grapes were made into wine, the wine belonged to the maker, who was only obliged to pay the owner for the value of his grapes. The species however must be incapable of being restored to its ancient form; and the materials must have been taken in ignorance of their being the property of another.

But it was thought in the court below that this doctrine had never been adopted into the common law, either in England or here; and the distinction between a wilful and an involuntary wrongdoer herein before mentioned, was rejected not only on that ground but also because the rule was supposed to be too harsh and rigorous against the wrondoer.

It is true that no case has been found in the English books in which that distinction has been expressly recognized; but it is equally true that in no case until the present has it been repudiated or denied. The common law on this subject was evidently borrowed from the Roman at an early day; and at a period when the common law furnished no rule whatever in a case of this kind. Bracton, in his treatise compiled in the reign of Henry III., adopted a portion of Justinian's Institutes on this subject without noticing the distinction; and Blackstone, in his commentaries, vol. 2, p. 404, in stating what the Roman law was, follows Bracton, but neither of these writers intimate that on the point in question there is any difference between the civil and the common law. The authorities referred to by Blackstone in support of his text are three only. The first in Brooks' Abridgment, tit. Property 23, is the case from the Year Book, 5 H. 7, fol. 15 (translated in a note to 4 Denio 335), in which the owner of leather brought trespass for taking slippers and boots, and the defendant pleaded that he was the owner of the leather and bailed it to J. S., who gave it to the plaintiff, who manufactured it into slippers and boots, and the defendant took them as he lawfully might. The plea was held good and the title of the owner of the leather unchanged. The second reference is to a case in Sir Francis Moore's reports, p. 20, in which the action was trespass for taking timber, and the defendant justified on the ground that A. entered on his land and cut down trees and made timber thereof, and carried it to the place where the trespass was alleged to have been committed, and afterwards gave it to the plaintiff, and that the defendant therefore took the timber as he lawfully might. In these cases the chattels had passed from the

hands of the original trespasser into the hands of a third person; in both it was held that the title of the original owner was unchanged, and that he had a right to the property in its improved state, against the third person in possession. They are in conformity with the rule of the civil law; and certainly fail to prove any difference between the civil and the common law on the point in question. The third case cited is from Popham's reports, p. 38, and was a case of confusion of goods. * * * Neither Bracton nor Blackstone have pointed out any difference except in the case of confusion of goods between the common law and the Roman, from which on this subject our law has mainly derived its principles.

So long as property wrongfully taken retains its original form and substance, or may be reduced to its original materials, it belongs, according to the admitted principles of the common law, to the original owner, without reference to the degree of improvement, or the additional value given to it by the labor of the wrongdoer. Nay, more, this rule holds good against an innocent purchaser from the wrongdoer, although its value be increased an hundred fold by the labor of the purchaser. This is a necessary consequence of the continuance of the original ownership.

There is no satisfactory reason why the wrongful conversion of the original materials into an article of a different name or a different species should work a transfer of the title from the true owner to the trespasser, provided the real identity of the thing can be traced by evidence. The difficulty of proving the identity is not a good reason. It relates merely to the convenience of the remedy, and not at all to the right. There is no more difficulty or uncertainty in proving that the whisky in question was made of Wood's corn, than there would have been in proving that the plaintiff had made a cup of his gold, or a tool of his iron; and yet in those instances, according to the English cases, the proof would have been unobjectionable. In all cases where the new product can not be identified by mere inspection, the original material must be traced by the testimony of witnesses from hand to hand through the process of transformation.

Again. The court below seem to have rejected the rule of the civil law applicable to this case, and to have adopted a principle not heretofore known to the common law; and for the reason that the rule of the civil law was too rigorous upon the wrongdoer, in depriving him of the benefit of his labor bestowed upon the goods wrongfully taken. But we think the civil law in this respect is

in conformity not only with plain principles of morality, but supported by cogent reasons of public policy; while the rule adopted by the court below leads to the absurdity of treating the wilful trespasser with greater kindness and mercy than it shows to the innocent possessor of another man's goods. A single example may suffice to prove this to be so. A trespasser takes a quantity of iron ore belonging to another and converts it into iron, thus changing the species and identity of the article: the owner of the ore may recover its value, in trover or trespass; but not the value of the iron, because under the rule of the court below it would be unjust and rigorous to deprive the trespasser of the value of his labor in the transmutation. But if the same trespasser steals the iron and sells it to an innocent purchaser, who works it into cutlery, the owner of the iron may recover of the purchaser the value of the cutlery, because by this process the original material is not destroyed, but remains, and may be reduced to its former state; and according to the rule adopted by the court below as to the change of identity the original ownership remains. Thus the innocent purchaser is deprived of the value of his labor, while the guilty trespasser is not.

The rule adopted by the court below seems, therefore, to be objectionable, because it operates unequally and unjustly. It not only divests the true owner of his title, without his consent; but it obliterates the distinction maintained by the civil law, and as we think by the common law, between the guilty and the innocent; and abolishes a salutary check against violence and fraud upon the rights of property.

We think, moreover, that the law on this subject has been settled by judicial decisions in this country. In Betts v. Lee (5 John. 349), it was decided that as against a trespasser the original owner of the property may seize it in its new shape, whatever alteration of form it may have undergone, if he can prove the identity of the original materials. That was a case in which the defendant had cut down the plaintiff's trees, and made them into shingles. So in Curtis v. Groat (6 John. 169), a trespasser cut wood on another's land and converted it into charcoal. It was held that the charcoal still belonged to the owner of the wood. Here was a change of the wood into an article of different kind and species. No part of the substance of the wood remained in its original state; its identity could not be ascertained by the senses, nor could it be restored to what it originally was. That case distinctly recognizes the principle that a wilful trespasser cannot acquire a title to property merely

by changing it from one species to another. And the late Chancellor Kent, in his Commentaries (Vol. 2, p. 363), declares that the English law will not allow one man to gain a title to the property of another upon the principle of accession, if he took the other's property wilfully as a trespasser; and that it was settled as early as the time of the year books, that whatever alteration of form any property had undergone, the owner might seize it in its new shape, if he could prove the identity of the original materials.

The same rule has been adopted in Pennsylvania. (Snyder v. Vaux, 2 Rawle 427.) And in Maine and Massachusetts it has been applied to a wilful intermixture of goods. (Ryder v. Hathaway, 21 Pick. 304, 5; Wingate v. Smith, 7 Shep. 287; Willard v. Rice, 11 Metc. 493.)

We are, therefore, of opinion that if the plaintiffs below in converting the corn into whisky knew that it belonged to Wood, and that they were thus using it in violation of his right, they acquired no title to the manufactured article, which although changed from the original material into another of different nature, yet being the actual product of the corn, still belonged to Wood. The evidence offered by the defendants and rejected by the circuit judge ought to have been admitted.

The right of Wood's creditors to seize the whisky by their execution is a necessary consequence of Wood's ownership. Their right is paramount to his, and of course to his election to sue in trover or trespass for the corn.

The judgment of the supreme court should be reversed and a new trial ordered.

GARDINER, JEWETT, HURLBUT, and PRATT, Js., concurred.

BRONSON, Ch. J.—Two very able arguments here, against the opinion which I delivered when the case was before the supreme court (4 Denio 332), have only served to confirm me in the conclusion at which I then arrived. I shall add but little now to what I said on the former occasion.

The owner may, as a general rule, follow and retake the property of which he has been wrongfully deprived so long as the same thing remains, though it may have been changed in form and value by the labor and skill of the wrongdoer. But when, as in this case, the identity of the thing has been destroyed by a chemical process, so that the senses can no longer take cognizance of it—when it has not only changed its form and appearance, but has so combined with other elements that it has ceased to be the same

thing, and become something else, the owner can, I think, follow it no longer: his remedy is an action for damages. Such I take to be the rule of the common law; and that is our law.

The rule for which the defendants contend, that in the case of a wilful trespass, the owner may follow and retake his property after it has been changed into a thing of a different species—that he may trace corn into whisky, and take the new product—is open to several objections. First: It would be nearly or quite impossible to administer such a rule in trials by jury. Second: The rule would often work injustice, by going beyond the proper measure of either redress or punishment; while an action for damages would render exact justice to both parties. It is very true that a wilful trespasser should be punished; but that proves nothing. All agree that he should be made to suffer; but the mode and measure of punishment are questions which still remain. If one has knowingly taken six pence worth of his neighbor's goods as a trespasser, he should neither be imprisoned for life, nor should he forfeit a thousand dollars. We should not lose sight of the fact, that the rule now to be established is one for future, as well as present use; and it may work much greater injustice in other cases than it can in this. Third: There is no authority at the common law for following and retaking the new product in a case like this. I make the remark with the more confidence, because the very diligent counsel for the defendants, after having had several years, pending this controversy, for research, has only been able to produce some *dicta* of a single jurist, without so much as one common law adjudication in support of the rule for which he contends. He is driven to the civil law; and then the argument is, that because we, in common with the civilians, allow the owner to retake his property in certain cases, we must be deemed to have adopted the rule of the civil law on this subject in its whole extent. But that is a *non sequitur*. It often happens that our laws and those of the Romans—and, indeed, of all civilized nations—are found to agree in some particulars, while they are widely different in others; and this is true of laws relating to a single subject. There is no force, therefore, in the argument, that because our law touching this matter is to some extent like the civil law, it may be presumed that the two systems are alike in every particular. And clearly, the burden of showing that the Roman law is our law, lies on those who affirm that fact. There is not only the absence of any common law adjudication in favor of the rule for which the defendants contend, but in one of the earliest cases on the sub-

ject to be found in our books (Year Book, 5 H. 7, fol. 15, 4 Denio 335, note), the court plainly recognized the distinction which has been mentioned, and admitted that the owner could not retake the property after its identity had been destroyed; and "grain taken and malt made of it" was given as an example.

There are many cases where the title to a personal chattel may be turned into a mere right of action, without the consent of the owner, although the thing was taken by a wilful trespasser, or even by a thief. If a man steal a piece of timber, and place it as a beam or rafter in his house; or a nail, and drive it into his ship; or paint, and put it upon his carriage, the owner cannot retake his goods, but is put to his action for damages; and this is so in the civil, as well as at the common law. If a thief take water from another's cistern, and use it in making beer; or salt, and use it in pickling pork; or fuel, and use it in smoking hams, I suppose no one will say, that the owner of the water, the salt or the fuel may seize the beer, the pork or the hams. And there is no better reason for giving him the new product, where sand is made into glass, malt into beer, coal into gas, or grain into whisky. In the case now before us, the civilians would not go so far as to say, that the owner of the grain might take the swine which were fattened on the refuse of the grain after it had gone through the process of distillation. And yet that would hardly be more unjust or absurd than it would be to give him the whisky. There must be a limit somewhere; and I know of none which is more safe, practical and just than that which allows the owner to follow a chattel until it has either been changed into a different species, or been adjoined to something else, which is the principal thing; and stops there. Thus far our courts have gone, and there they have stopped. We have neither precedent nor reason in favor of taking another step; and I cannot take it.

Judge Harris agrees with me in the opinion that the judgment of the supreme court is right, and should be affirmed.

TAYLOR, J., did not hear the argument, and gave no opinion.

Judgment reversed.[2]

[2] See Childs' Personal Property, § 280.

INNOCENT TRESPASSER.

THE ISLE ROYALE MINING CO. v. HERTIN et al.

37 Mich. 332, 26 Am. Rep. 520. 1877.

The facts are stated in the opinion.

COOLEY, C. J.—The parties to this suit were owners of adjoining tracts of timbered lands. In the winter of 1873-4 defendants in error, who were plaintiffs in the court below, in consequence of a mistake respecting the actual location, went upon the lands of the mining company and cut a quantity of cord wood, which they hauled and piled on the bank of Portage Lake. The next spring the wood was taken possession of by the mining company, and disposed of for its own purposes. The wood on the bank of the lake was worth $2.87½ per cord, and the value of the labor expended by plaintiffs in cutting and placing it there was $1.87⅛ per cord. It was not clearly shown that the mining company had knowledge of the cutting and hauling by the plaintiffs while it was in progress. After the mining company had taken possession of the wood, plaintiffs brought this suit. * * *

The circuit judge instructed the jury as follows:

"If you find that the plaintiffs cut the wood from defendant's land by mistake and without any wilful negligence or wrong, I then charge you that the plaintiffs are entitled to recover from the defendant the reasonable cost of cutting, hauling and piling the same."

This presents the only question it is necessary to consider on this record. The jury returned a verdict for the plaintiffs.

Some facts appear by the record which might perhaps have warranted the circuit judge in submitting to the jury the question whether the proper authorities of the mining company were not aware that the wood was being cut by the plaintiffs under an honest mistake as to their rights, and were not placed by that knowledge under obligation to notify the plaintiffs of their error. But as the case was put to the jury, the question presented by the record is a narrow question of law, which may be stated as follows: whether, where one in an honest mistake regarding his rights in good faith performs labor on the property of another, the benefit of which is appropriated by the owner, the person performing such labor is not entitled to be compensated therefor to the extent of

the benefit received by the owner therefrom? The affirmative of this proposition the plaintiffs undertook to support, having first laid the foundation for it by showing the cutting of the wood under an honest mistake as to the location of their land, the taking possession of the wood afterwards by the mining company, and its value in the condition in which it then was and where it was, as compared with its value standing in the woods.

We understand it to be admitted by the plaintiffs that no authority can be found in support of the proposition thus stated. It is conceded that at the common law when one thus goes upon the land of another on an assumption of ownership, though in perfect good faith and under honest mistake as to his rights, he may be held responsible as a trespasser. His good faith does not excuse him from the payment of damages, the law requiring him at his peril to ascertain what his rights are, and not to invade the possession, actual or constructive, of another. If he cannot thus protect himself from the payment of damages, still less, it would seem, can he establish in himself any affirmative rights, based upon his unlawful, though unintentional encroachment upon the rights of another. Such is unquestionably the rule of the common law, and such it is admitted to be.

It is said, however, that an exception to this rule is admitted under certain circumstances, and that a trespasser is even permitted to make title in himself to the property of another, where in good faith he has expended his own labor upon it, under circumstances which would render it grossly unjust to permit the other party to appropriate the benefit of such labor. The doctrine here invoked is the familiar one of title by accession, and though it is not claimed that the present case is strictly within it, it is insisted that it is within its equity, and that there would be no departure from settled principles in giving these plaintiffs the benefit of it.

The doctrine of title by accession is in the common law as old as the law itself, and was previously known in other systems. Its general principles may therefore be assumed to be well settled. A wilful trespasser who expends his money or labor upon the property of another, no matter to what extent, will acquire no property therein, but the owner may reclaim it so long as its identity is not changed by conversion into some new product. Indeed some authorities hold that it may be followed even after its identity is lost in a new product; that grapes may be reclaimed after they have been converted into wine, and grain in the form

of distilled liquors. Silsbury v. McCoon, 3 N. Y. 379. See Riddle v. Driver, 12 Ala. 590. And while other authorities refuse to go so far, it is on all hands conceded that where the appropriation of the property of another was accidental or through mistake of fact, and labor has in good faith been expended upon it which destroys its identity, or converts it into something substantially different, and the value of the original article is insignificant as compared with the value of the new product, the title of the property in its converted form must be held to pass to the person by whose labor in good faith the change has been wrought, the original owner being permitted, as his remedy, to recover the value of the article as it was before the conversion. This is a thoroughly equitable doctrine, and its aim is so to adjust the rights of the parties as to save both, if possible, or as nearly as possible, from any loss. But where the identity of the original article is susceptible of being traced, the idea of a change in the property is never admitted, unless the value of that which has been expended upon it is sufficiently great, as compared with the original value, to render the injustice of permitting its appropriation by the original owner so gross and palpable as to be apparent at the first blush. Perhaps no case has gone further than Wetherbee v. Green, 22 Mich. 311, in which it was held that one who, by unintentional trespass, had taken from the land of another young trees of the value of $25, and converted them into hoops worth $700, had thereby made them his own, though the identity of trees and hoops was perfectly capable of being traced and established.

But there is no such disparity in value between the standing trees and the cord wood in this case as was found to exist between the trees and the hoops in Wetherbee v. Green. The trees are not only susceptible of being traced and identified in the wood, but the difference in value between the two is not so great but that it is conceivable the owner may have preferred the trees standing to the wood cut. The cord wood has a higher market value, but the owner may have chosen not to cut it, expecting to make some other use of the trees than for fuel, or anticipating a considerable rise in value if they were allowed to grow. It cannot be assumed as a rule that a man prefers his trees cut into cord wood rather than left standing, and if his right to leave them uncut is interfered with even by mistake, it is manifestly just that the consequences should fall upon the person committing the mistake, and not upon him. Nothing could more encourage carelessness than the acceptance of the principle that one who by mistake per-

forms labor upon the property of another should lose nothing by his error, but should have a claim upon the owner for remuneration. Why should one be vigilant and careful of the rights of others if such were the law? Whether mistaken or not is all the same to him, for in either case he has employment and receives his remuneration; while the inconveniences, if any, are left to rest with the innocent owner. Such a doctrine offers a premium to heedlessness and blunders, and a temptation by false evidence to give an intentional trespass the appearance of an innocent mistake.

A case could seldom arise in which the claim to compensation could be more favorably presented by the facts than it is in this; since it is highly probable that the defendant would suffer neither hardship nor inconvenience if compelled to pay the plaintiffs for their labor. But a general principle is to be tested, not by its operation in an individual case, but by its general workings. If a mechanic employed to alter over one man's dwelling house, shall by mistake go to another which happens to be unoccupied, and before his mistake is discovered, at a large expenditure of labor shall thoroughly overhaul and change it, will it be said that the owner, who did not desire his house disturbed, must either abandon it altogether, or if he takes possession, must pay for labor expended upon it which he neither contracted for, desired nor consented to? And if so, what bounds can be prescribed to which the application of this doctrine can be limited? The man who by mistake carries off the property of another will next be demanding payment for the transportation; and the only person reasonably secure against demands he has never assented to create, will be the person who, possessing nothing, is thereby protected against any thing being accidentally improved by another at his cost and to his ruin.

The judgment of the circuit court must be reversed, with costs, and a new trial ordered.

The other Justices concurred.[3]

ENHANCED VALUE.

WETHERBEE v. GREEN.

22 Mich. 311, 7 Am. Rep. 653. 1871.

The facts are stated in the opinion.

COOLEY, J.—The defendants in error replevied of Wetherbee a quantity of hoops, which he had made from timber cut upon their

[3] See Childs' Personal Property, § 281.

land. Wetherbee defended the replevin suit on two grounds. *First,* he claimed to have cut the timber under a license from one Sumner, who was formerly tenant in common of the land with Green, and had been authorized by Green to give such license. Before the license was given, however, Sumner had sold his interest in the land to Camp and Brooks, the co-plaintiffs with Green, and had conveyed the same by warranty deed; but Wetherbee claimed and offered to show by parol evidence, that the sole purpose of this conveyance was to secure a pre-existing debt from Sumner to Camp and Brooks, and that consequently it amounted to a mortgage only, leaving in Sumner, under our statute, the usual right of a mortgagor to occupy and control the land until foreclosure. * * *

But if the court should be against him on this branch of the case, Wetherbee claimed further that replevin could not be maintained for the hoops, because he had cut the timber in good faith, relying upon a permission which he supposed proceeded from the parties having lawful right to give it, and had, by the expenditure of his labor and money, converted the trees into chattels immensely more valuable than they were as they stood in the forest, and thereby he had made such chattels his own. And he offered to show that the standing timber was worth twenty-five dollars only, while the hoops replevied were shown by the evidence to be worth near seven hundred dollars; also, that at the time of obtaining the license from Sumner he had no knowledge of the sale of Sumner's interest, but, on the other hand, had obtained an abstract of the title to the premises from a firm of land agents at the county seat, who kept an abstract book of titles to land in that county, which abstract showed the title to be in Green and Sumner, and that he then purchased the timber, relying upon the abstract, and upon Sumner's statement that he was authorized by Green to make the sale. The evidence offered to establish these facts was rejected by the court, and the plaintiffs obtained judgment.

The principal question which, from this statement, appears to be presented by the record, may be stated thus: Has a party who has taken the property of another in good faith, and in reliance upon a supposed right, without intention to commit wrong, and by the expenditure of his money or labor, worked upon it so great a transformation as that which this timber underwent in being transformed from standing trees into hoops, acquired such a property therein that it cannot be followed into his hands and reclaimed by the owner of the trees in its improved condition?

The objections to allowing the owner of the trees to reclaim the

property under such circumstances are, that it visits the involuntary wrong-doer too severely for his unintentional trespass, and at the same time compensates the owner beyond all reason for the injury he has sustained. In the redress of private injuries the law aims not so much to punish the wrongdoer as to compensate the sufferer for his injuries; and the cases in which it goes farther and inflicts punitory or vindictive penalties are those in which the wrong-doer has committed the wrong recklessly, willfully, or maliciously, and under circumstances presenting elements of aggravation. Where vicious motive or reckless disregard of right are not involved, to inflict upon a person who has taken the property of another, a penalty equal to twenty or thirty times its value, and to compensate the owner in a proportion equally enormous, is so opposed to all legal idea of justice and right and to the rules which regulate the recovery of damages generally, that if permitted by the law at all, it must stand out as an anomaly and must rest upon peculiar reasons.

As a general rule, one whose property has been appropriated by another without authority has a right to follow it and recover the possession from any one who may have received it; and if, in the meantime, it has been increased in value by the addition of labor or money, the owner may, nevertheless, reclaim it, provided there has been no destruction of substantial identity. So far the authorities are agreed. A man cannot generally be deprived of his property except by his own voluntary act or by operation of law; and if unauthorized parties have bestowed expense or labor upon it, that fact cannot constitute a bar to his reclaiming it, so long as identification is not impracticable. But there must, nevertheless, in reason be some limit to the right to follow and reclaim materials which have undergone a process of manufacture. Mr. Justice Blackstone lays down the rule very broadly, that if a thing is changed into a different species, as by making wine out of another's grapes, oil from his olives, or bread from his wheat, the product belongs to the new operator, who is only to make satisfaction to the former proprietor for the materials converted: 2 Bl. Com. 404. We do not understand this to be disputed as a general proposition, though there are some authorities which hold that, in the case of a willful appropriation, no extent of conversion can give to the willful trespasser a title to the property so long as the original materials can be traced in the improved article. The distinction thus made between the case of an appropriation in good faith and one based on intentional wrong, appears to have come from the civil law,

which would not suffer a party to acquire title by accession, founded on his own act, unless he had taken the materials in ignorance of the true owner, and given them a form which precluded their being restored to their original condition: 2 Kent 363. While many cases have followed the rule as broadly stated by Blackstone, others have adopted the severe rule of the civil law where the conversion was in willful disregard of right. The New York cases of Betts v. Lee, 5 Johns. 348; Curtis v. Groat, 6 Johns. 168 and Chandler v. Edson, 9 Johns. 362, were all cases where the willful trespasser was held to have acquired no property by a very radical conversion, and in Silsbury v. McCoon, 3 N. Y. 378, 385, the whole subject is very fully examined, and Ruggles J., in delivering the opinion of the court, says that the common law and the civil law agree "that if the chattel wrongfully taken come into the hands of an *innocent holder* who, believing himself to be the owner, converts the chattel into a thing of different species, so that its identity is destroyed, the original owner cannot reclaim it. * * *

It does not become necessary for us to consider whether the case of Silsbury v. McCoon, 3 N. Y. 378, which overruled the prior decisions of the supreme court (reported in 4 Denio 425 and 6 Hill 332), has not recognized a right in the owner of the original materials to follow them under circumstances when it would not be permitted by the rule as recognized by the authorities generally. That was the case where a willful trespasser had converted corn into whisky, and the owner of the corn was held entitled to the manufactured article. The rule as given by Blackstone would confine the owner, in such case, to his remedy to recover damages for the original taking. But we are not called upon in this case to express any opinion regarding the rule applicable in the case of a willful trespasser, since the authorities agree in holding that, when the wrong had been involuntary, the owner of the original materials is precluded, by the civil law and common law alike, from following and reclaiming the property after it has undergone a transformation which converts it into an article substantially different.

The cases of confusion of goods are closely analogous. It has always been held that he who, without fraud, intentional wrong, or reckless disregard of the rights of others, mingled his goods with those of another person, in such manner that they could not be distinguished, should, nevertheless, be protected in his ownership so far as the circumstances would permit. The question of motive

here becomes of the highest importance; for, as Chancellor Kent says, if the commingling of property "was willfully made without mutual consent, * * * the common law gave the entire property, without any account, to him whose property was originally invaded, and its distinct character destroyed: Popham's Rep. 38, Pl. 2. If A will willfully intermix his corn or hay with that of B, or casts his gold into another's crucible, so that it becomes impossible to distinguish what belonged to A from what belonged to B, the whole belongs to B: Popham's Rep., *ub supra;* * * * Hart v. Ten Eyck, 2 Johns. Ch. 62; Gordon v. Jenney, 16 Mass. 465; Treat v. Barber, 7 Conn. 280; Barron v. Cobleigh, 11 N. H. 561; Roth v. Wells, 29 N. Y. 486; Willard v. Rice, 11 Met. 493; Jenkins v. Steanka, 19 Wis. 128; Hesseltine v. Stockwell, 30 Me. 237. But this rule only applies to wrongful or fraudulent intermixtures. There may be an intentional intermingling, and yet no wrong intended, as where a man mixes two parcels together, supposing both to be his own; or, that he was about to mingle his with his neighbor's, by agreement, and mistakes the parcel. In such cases, which may be deemed accidental intermixtures, it would be unreasonable and unjust that he should lose his own or be obliged to take and pay for his neighbor's, as he would have been under the civil law: Morton J. in Ryder v. Hathaway, 21 Pick. 305. In many cases there will be difficulty in determining precisely how he can be protected with due regard to the rights of the other party; but it is clear that the law will not forfeit his property in consequence of the accident or inadvertence, unless a just measure of redress to the other party renders it inevitable: Story on Bailm., § 40; Sedg. on Dams, 483.

The important question on this branch of the case appears to us to be, whether standing trees, when cut and manufactured into hoops, are to be regarded as so far changed in character that their identity can be said to be destroyed within the meaning of the authorities. And as we enter upon a discussion of this question, it is evident at once that it is difficult, if not impossible, to discover any invariable and satisfactory test which can be applied to all the cases which arise in such infinite variety. "If grain be taken and made into malt, or money taken and made into a cup, or timber taken and made into a house, it is held in the old English law that the property is so altered as to change the title: Bro. Tit. Property, Pl. 23;" 2 Kent 363. But cloth made into garments, leather into shoes, trees hewn or sawed into timber, and iron made into bars, it is said may be reclaimed by the owner in their new

and original shape: Sedg. on Dams, 484; Snyder v. Vaux, 2 Rawle 427; Betts v. Lee, 5 Johns. 348; Curtis v. Groat, 6 Johns. 168; Brown v. Sax, 7 Cow. 95; Silsbury v. McCoon, 4 Denio 333, per Bronson J.; Ibid., 6 Hill 426, per Nelson Ch. J.; Ibid., 3 N. Y. 386, per Ruggles J. Some of the cases place the right of the former owner to take the thing in its altered condition upon the question whether its identity could be made out by the senses: Year Book 5, H. 7, fol. 15, Pl. 6; 4 Denio 335, note. But this is obviously a very unsatisfactory test, and in many cases would wholly defeat the purpose which the law has in view in recognizing a change of title in any of these cases. That purpose is not to establish any arbitrary distinctions, based upon mere physical reasons, but to adjust the redress afforded to the one party and the penalty inflicted upon the other, as near as circumstances will permit, to the rules of substantial justice.

It may often happen that no difficulty will be experienced in determining the identity of a piece of timber which has been taken and built into a house; but no one disputes that the right of the original owner is gone in such a case. A particular piece of wood might, perhaps, be traced without trouble into a church organ, or other equally valuable article; but no one would defend a rule of law which, because the identity could be determined by the senses, would permit the owner of the wood to appropriate a musical instrument, a hundred or a thousand times the value of his original materials, when the party who, under like circumstances, has doubled the value of another man's corn by converting it into malt, is permitted to retain it, and held liable for the original value only. Such distinctions in the law would be without reason, and could not be tolerated. When the right to the improved article is the point in issue, the question, how much the property or labor of each has contributed to make it what it is, must always be one of first importance. The owner of a beam built into the house of another loses his property in it, because the beam is insignificant in value or importance as compared to that to which it has become attached, and the musical instrument belongs to the maker rather than to the man whose timber was used in making it—not because the timber cannot be identified, but because, in bringing it to its present condition the value of the labor has swallowed up and rendered insignificant the value of the original materials. The labor, in the case of the musical instrument, is just as much the principal thing as the house is in the other case instanced; the timber appropriated is in each case comparatively unimportant.

No test which satisfies the reason of the law can be applied in the adjustment of questions of title to chattels by accession, unless it keeps in view the circumstance of relative values. When we bear in mind the fact that what the law aims at is the accomplishment of substantial equity, we shall readily perceive that the fact of the value of the materials having been increased a hundred-fold, is of more importance in the adjustment than any chemical change or mechanical transformation, which, however radical, neither is expensive to the party making it, nor adds materially to the value. There may be complete changes with so little improvement in value, that there could be no hardship in giving the owner of the original materials the improved article; but in the present case, where the defendant's labor—if he shall succeed in sustaining his offer of testimony—will appear to have given the timber in its present condition nearly all its value, all the grounds of equity exist which influence the courts in recognizing a change of title under any circumstances.

We are of opinion that the court erred in rejecting the testimony offered. The defendant, we think, had a right to show that he had manufactured the hoops in good faith, and in the belief that he had the proper authority to do so; and if he should succeed in making that showing, he was entitled to have the jury instructed that the title to the timber was changed by a substantial change of identity, and that the remedy of the plaintiff was an action to recover damages for the unintentional trespass.

This view will dispose of the case upon the present record. * * *

For the reasons given the judgment must be reversed, with costs, and a new trial ordered.

The other justices concurred.[4]

MEASURE OF DAMAGES.

WINCHESTER v. CRAIG et al.

33 Mich. 205. 1876.

The facts are stated in the opinion.

MARSTON, J.—Winchester brought an action of trover to recover damages for the conversion by defendants of a quantity of pine

[4] See Childs' Personal Property, § 281.

sawlogs. It appeared on the trial that defendants were the owners of the north half of section thirty-three, township twenty-one north, range six east, in this state; that they contracted with one Smith to lumber on said land; that by mistake Smith cut the logs in question upon the south half of said section, caused the same to be hauled a distance of about five miles to the Au Sable river, thence run to the boom at the mouth of said river, there rafted and towed from thence to Toledo in the state of Ohio, where they were sold at twelve dollars per thousand feet.

Evidence was also given tending to show that the timber while standing on the land was worth one dollar and fifty cents per thousand feet; that the cost of cutting it was fifty cents per thousand; hauling the logs to the river, five or six dollars per thousand; and their value in the river eight dollars per thousand; that the cost of running them to the boom was thirty-seven and a half cents per thousand; boom charges, one dollar per thousand; rafting and towing to Toledo, two dollars per thousand; and their value there, twelve to thirteen dollars per thousand.

It also appeared that when these logs were cut, the south half of said section was owned by Eber B. Ward, and that he afterwards, and before suit was brought, assigned all his claim and right of action for such cutting to the plaintiff.

The plaintiff claimed to recover the price at which the timber was sold in Toledo.

The court charged the jury that if they found no willful wrong on the part of the defendants, they might award as damages the value of the property where it was taken, viz.: one dollar and fifty cents per thousand, together with the profits which might have been derived from its value in the ordinary market, or that they might take the market value at Toledo, deduct precisely the sum defendants expended in bringing it to that market and putting it in condition for sale, and award the difference between these two sums, with interest, in either case, from the time the conversion took place; and refused to charge that the plaintiff could recover as damages the price for which the logs were sold in Toledo.

The finding of the jury, as appears from the printed record, was as follows: "The defendants cut the timber on the land of Ward by mistake; the quantity cut was one million ninety-three thousand seven hundred and eighty-six feet; the value on the land after it was cut was two dollars per thousand feet; the value at Toledo, and for which the defendants sold the timber, was twelve dollars per thousand; the expenses of the defendants on the timber in cut-

ting and removing the same to Toledo, nine dollars and thirty-seven cents per thousand;" and they assessed the plaintiff's damages at the sum of three thousand six hundred and thirty-one dollars and forty cents.

It will thus be seen that the only question raised by this record is, where parties by mistake cut timber upon the lands of another, and at their own expense transport it to market and sell it, whether the plaintiff in an action of trover can recover as damages the market value at the time and place where it was sold.

An examination of the authorities bearing upon this question shows that they are not in harmony, and that the courts have not always agreed as to the proper measure of damages in this class of cases. Some courts have held, in cases like the present, that the plaintiff could recover as damages the value of the logs at any place to which they were taken and sold or converted, while others have held such a measure of damages applicable only in cases where there was fraud, violence or willful negligence or wrong, and that where none of these elements appeared, but on the contrary the defendants had acted in entire good faith, and had by their labor and skill materially enhanced the value of the property converted, the plaintiff could not recover such enhanced value. In this last class of cases the decisions are not uniform as to whether the value of the property when first severed from the realty, as in cases of timber or coal where this question has arisen, or the value in its original condition, with such other damage to the realty as the injury may have caused, would constitute the proper measure.

It is apparent upon examination that there is no fixed definite measure of damages applicable in all cases of conversion of property; and while the general rule undoubtedly is, in ordinary cases, that the full value of the property at the time and place of its conversion, together with interest thereon, is the correct measure of damages in actions of trover, yet, as was said in Northrup v. McGill, 27 Mich. 238, "this rule yields, when the facts require it, to the principle on which the rule itself rests, namely: that the recovery in trover ought to be commensurate, and only commensurate with the injury, whether that injury be greater or less in extent than the full value of the property and interest." * * *

It is somewhat difficult to conceive why, upon principle, this rule should not be applied in its fullest extent to cases like the present. The cases, it is believed, all agree that punitory or exemplary damages are never given or allowed in cases where the defendant has acted in entire good faith, under an honest belief that he

had a legal right to do the act complained of, although, even in such cases, he would be conclusively held to have contemplated, and the plaintiff would be permitted to recover, all the damages which legitimately followed from his illegal act, whether in fact he actually contemplated that such damages would follow or not. Such damages, however, would, in no just sense of the term, be held as punitory or exemplary; they would be but the actual damages which the plaintiff had suffered from the wrongful act of the defendant. Such then being the general rules applicable in cases even of active, aggressive wrongs, what is there in this case to make it an exception?

It does not require any argument, and I shall attempt none, to prove that the pecuniary injury sustained by the plaintiff, from the trespass complained of, falls far short of the value of these logs at Toledo; and that to award the value at the latter place as the measure of damages would be much more than compensation, and would, although under a different name, be but awarding exemplary damages, and that, too, in a case where upon principle the defendants had been guilty of no act calling for such a punishment.

It is also clear beyond question that had the plaintiff commenced any other form of action to recover damages for the injury which he sustained, he could not in such action recover the market value of the logs at Toledo. It is very evident, therefore, that the right of the plaintiff to recover the value at Toledo depends entirely upon the particular form of action adopted in this case; as in any other, where the defendants had acted honestly, he could only recover the amount of the actual injury sustained.

Passing for the present the adjudged cases, I can see no good reason or principle why the measure of damages in actions of trover should be different from that in other actions sounding in tort; and to hold that there is such a distinction is to permit the form of the action, rather than the actual injury complained of to fix the damages. * * *

* * * The law rather aims, so far as possible, to protect the plaintiff, but at the same time it has a due regard to the rights of the defendants, and it will not inflict an undue or unjust punishment upon them, in cases where they are not deserving it, as a means of righting an injury, especially where it would much more than compensate the owner for the injury which he sustained.

In this case each has an interest in the logs; the plaintiff as assignee of the original owner; the defendant by, in good faith, largely increasing their value. Each should be protected in his rights, and thus as nearly as possible substantial justice be done.

To allow the plaintiff to recover what he here seeks would be to break down all distinctions between the willful and involuntary trespasser; a distinction which is based upon sound legal principles, and which is applied in all other forms of action.

What we have here said must not be considered as having any application in cases where the trespass or wrong complained of was willful or negligent. We are not yet prepared to say that the willful trespasser can derive any advantage whatever from his own wrong. On the contrary, there is sound reason for holding that the owner in such cases may reclaim his property wherever and in whatever shape he may find it.

The court under one branch of the charge instructed the jury to allow the market value at Detroit, or Toledo, less the sum of money which defendants expended in bringing it to market. This, we think, was as favorable as the plaintiff had any right in this case to expect. This was allowing the plaintiff more than the value of the timber when it was first severed from the realty. It did not permit the defendants to recover any profit upon what they had done, but protected them to the extent of the advances they had made; and this, we think, was correct.

There might, however, be cases where this rule would not apply, where the market value did not cover the cost of cutting and taking it to market, and cases where it was not sold. In such cases the plaintiff would be entitled to recover the value when the property was first severed from the realty (Greeley v. Stilson, 27 Mich. 154), and was thus in a shape where it could be converted, together with any profits which might be derived from its value in the ordinary market, with interest thereon. If any special damage is claimed beyond this, either to the inheritance or otherwise, it must be sought in some other and more appropriate form of action.

We think these rules, when applied by careful and intelligent jurors, will sufficiently protect all parties, and will afford no encouragement to trespassers.

Judgment affirmed with costs.[5]

[5] See Childs' Personal Property, §§ 282, 283.

Measure of damages. See Sligo Furnace Co. v. Hobart-Lee Tie Co., 153 Mo. App. 422, 134 S. W. 585; Gaskins v. Davis, 115 N. Car. 85, 20 S. E. 188, 26 Am. Rep. 525, 25 L. R. A. 813; Wing v. Milliken, 91 Me. 387, 40 Atl. 138.

PURCHASER FROM WILFUL TRESPASSER.

Measure of Damages.

THE BOLLES WOODEN WARE CO. v. UNITED STATES.

106 U. S. 432, 27 L. Ed. 230. 1882.

The facts are stated in the opinion.

MR. JUSTICE MILLER delivered the opinion of the court:

This is a writ of error to the Circuit Court for the Eastern District of Wisconsin, founded on a certificate of division of opinion between the Judges holding that court.

The facts, as certified, out of which this difference of opinion arose, appear in an action in the nature of trover, brought by the United States for the value of two hundred and forty-two cords of ash timber, or wood suitable for manufacturing purposes, cut and removed from that part of the public lands known as the reservation of the Oneida Tribe of Indians, in the State of Wisconsin. The timber was knowingly and wrongfully taken from the land by Indians, and carried by them some distance to the Town of Depere, and there sold to the defendant, which was not chargeable with any intentional wrong or misconduct or bad faith in the purchase.

The timber on the ground, after it was felled, was worth twenty-five cents per cord, or $60.71 for the whole and, at the Town of Depere, where defendant bought and received it, $3.50 per cord, or $8.50 for the whole quantity. The question on which the Judges divided was, whether the liability of the defendant should be measured by the first or the last of these valuations.

It was the opinion of the Circuit Judge that the latter was the proper rule of damages, and judgment was rendered against the defendant for that sum.

We cannot follow counsel for the plaintiff in error through the examination of all the cases, both in England and this country, which his commendable research has enabled him to place upon the brief. In the English courts the decisions have in the main grown out of coal taken from the mine, and in such cases the principle seems to be established in those courts, that when suit is brought for the value of the coal so taken, and it has been the result of an

honest mistake as to the true ownership of the mine, and the taking was not a willful trespass, the rule of damages is the value of the coal as it was in the mine before it was disturbed, and not its value when dug out and delivered at the mouth of the mine. * * *

The doctrine of the English courts on this subject is probably as well stated by Lord Hatherly in the House of Lords, in the case of Livington v. Rawyards Coal Co., L. R., 5 App. Cas. 33, as anywhere else. He said: "There is no doubt that if a man furtively, and in bad faith, robs his neighbor of his property, and because it is underground is probably for some little time not detected, the court of equity in this country will struggle, or, I would rather say, will assert its authority to punish the fraud by fixing the person with the value of the whole of the property which he has so furtively taken, and making him no allowance in respect of what he has so done, as would have been justly made to him if the parties had been working by agreement." But "When once we arrive at the fact that an inadvertence has been the cause of the misfortune, then the simple course is to make every just allowance for outlay on the part of the person who has so acquired the property, and to give back to the owner, so far as is possible under the circumstances of the case, the full value of that which cannot be restored to him *in specie.*"

There seems to us to be no doubt that in the case of a willful trespass, the rule as stated above is the law of damages, both in England and in this country, though in some of the state courts the milder rule has been applied even to this class of cases. Such are some that are cited from Wisconsin. Single v. Schneider, 24 Wis. 299; Weymouth v. R. R. Co., 17 Wis. 550.

On the other hand, the weight of authority, in this country as well as in England, favors the doctrine that, where the trespass is the result of inadvertence or mistake, and the wrong was not intentional, the value of the property when first taken must govern, or if the conversion sued for was after value had been added to it by the work of the defendant, he should be credited with this addition.

Winchester v. Craig, 33 Mich. 205, contains a full examination of the authorities on the point. Heard v. James, 49 Miss. 236; Baker v. Wheeler, 8 Wend. 505; Baldwin v. Porter, 12 Conn. 484.

While these principles are sufficient to enable us to fix a measure of damages in both classes of torts where the original trespasser is defendant, there remains a third class where a purchaser from him is sued, as in this case, for the conversion of the property to

his own use. In such case, if the first taker of the property were guilty of no willful wrong, the rule can in no case be more stringent against the defendant who purchased of him than against his vendor.

But the case before us is one where, by reason of the willful wrong of the party who committed the trespass, he was liable, under the rule we have supposed to be established, for the value of the timber at Depere the moment before he sold it; and the question to be decided is, whether the defendant who purchased it then, with no notice that the property belonged to the United States and with no intention to do wrong, must respond by the same rule of damages as his vendor should if he had been sued.

It seems to us that he must. The timber, at all stages of the conversion, was the property of plaintiff. Its purchase by defendant did not devest the title nor the right of possession. The recovery of any sum whatever is based upon that proposition. This right, at the moment preceding the purchase by defendant at Depere, was perfect, with no right in anyone to set up a claim for work and labor bestowed on it by the wrong-doer. It is also plain that by purchase from the wrong-doer defendant did not acquire any better title to the property than his vendor had. It is not a case where an innocent purchaser can defend himself under that plea. If it were, he would be liable to no damages at all, and no recovery could be had. On the contrary, it is a case to which the doctrine of *caveat emptor* applies, and hence the right of recovery in plaintiff.

On what ground then can it be maintained that the right to recover against him should not be just what it was against his vendor the moment before he interfered and acquired possession? If the case were one which concerned additional value placed upon the property by the work or labor of the defendant after he had purchased, the same rule might be applied as in case of the inadvertent trespasser.

But here he has added nothing to its value. He acquired possession of property of the United States at Depere, which, at that place and in its then condition, is worth $850, and he wants to satisfy the claim of the Government by the payment of $60. He founds his right to do this, not on the ground that anything *he* has added to the property has increased its value by the amount of the difference between these two sums, but on the proposition that in purchasing the property, he purchased of the wrong-doer a right to deduct what the labor of the latter had added to its value.

If, as in the case of an unintentional trespasser, such right existed, of course defendant would have bought it and stood in his shoes; but, as in the present case, of an intentional trespasser, who had no such right to sell, the defendant could purchase none.

Such is the distinction taken in the Roman law, as stated in the Institutes of Justinian, *Lib.* II., Title I., sec. 34. * * *

The case of Nesbitt v. Lumber Co., 21 Minn. 491, is directly in point here. The Supreme Court of Minnesota says: "The defendant claims that because they (the logs) were enhanced in value by the labor of the original wrong-doer in cutting them, and the expense of transporting them to Anoka, the plaintiff is not entitled to recover the enhanced value, that is, that he is not entitled to recover the full value at the time and place of conversion." That was a case, like this, where the defendant was the innocent purchaser of the logs from the willful wrong-doer, and where, as in this case, the transportation of them to a market was the largest item in their value at the time of conversion by defendant; but the court overruled the proposition and affirmed a judgment for the value at Anoka, the place of sale.

To establish any other principle in such a case as this, would be very disastrous to the interest of the public in the immense forest lands of the Government. It has long been a matter of complaint that the depredations upon these lands are rapidly destroying the finest forests in the world. Unlike the individual owner, who, by fencing and vigilant attention, can protect his valuable trees, the Government has no adequate defense against this great evil. Its liberality in allowing trees to be cut on its land for mining, agricultural and other specified uses, has been used to screen the lawless depredator who destroys and sells for profit.

To hold that when the Government finds its own property in hands but one remove from these willful trespassers, and asserts its right to such property by the slow processes of the law, the holder can set up a claim for the value which has been added to the property by the guilty party in the act of cutting down the trees and removing the timber, is to give encouragement and reward to the wrong-doer, by providing a safe market for what he has stolen and compensation for the labor he has been compelled to do, to make his theft effectual and profitable.

We concur with the Circuit Judge in this case, and the judgment of the Circuit Court is affirmed.[6]

[6] See Childs' Personal Property, § 283.
See Omaha & Grant Smelting & Refining Co. et al. v. Tabor et al., 13 Colo. 41, 21 Pac. 925.

CONFUSION.

Definition—Nature of.

HESSELTINE v. STOCKWELL.

30 Me. 237, 50 Am. Dec. 627. 1849.

The facts are stated in the opinion.

SHEPLEY, C. J.—This was an action of trover brought to recover the value of certain pine logs.

The logs appear to have composed a part of a larger lot estimated to contain more than six hundred thousand feet, which were cut and hauled by Leander Preble. The case states that there was testimony tending to prove that Preble cut on his own land about six hundred thousand feet of pine lumber, and also cut on the land of the plaintiff about one hundred thousand feet of pine lumber of a similar quality, all of which logs were marked with the same mark and hauled and landed on the same landing place.

With other instructions the jury were instructed, "that it did not appear, that any question of confusion of property arose in the action."

What will constitute a confusion of goods has been the subject of much discussion, and it has become a question of much interest to the owners of lands, upon which there are timber trees, as well as to those persons interested in the lumbering business, whether the doctrine can be applicable to the intermixture of logs.

When there has been such an intermixture of goods owned by different persons, that the property of each can no longer be distinguished, what is denominated a confusion of goods has taken place. And this may take place with respect to mill logs and other lumber. But it can do so only upon proof, that the property of each can no longer be distinguished. That the doctrine might be applicable to mill logs is admitted in the case of Loomis v. Green, 7 Greenl. 393. The case of Wingate v. Smith, 20 Maine, 287, has been alluded to as exhibiting a different doctrine; but the case does not authorize such a conclusion. The instructions were, "that merely taking the mill logs and fraudulently mixing them with the defendant's logs would not constitute confusion of goods." These instructions were, and clearly must have been, approved; for an additional element was required, that the mixture should have

been of such a character, that the property of each could no longer be distinguished. The opinion merely refers with approbation to the case of Ryder v. Hathaway, 21 Pick. 298, and says, "the principles there stated would authorize the instructions, which were given on that point in this case."

The common law in opposition to the civil law assigns the whole property, without liability to account for any part of it, to the innocent party, when there has been a confusion of goods, except in certain cases or conditions of property. Chancellor Kent correctly observes, that the rule is carried no further than necessity requires. 2 Kent's Com. 365.

There is therefore no forfeiture of the goods of one who voluntarily and without fraud makes such an admixture. As when, for example, he supposes all the goods to be his own, or when he does it by mistake.

And there is no forfeiture in case of a fraudulent intermixture, when the goods intermixed are of equal value. This has not been sufficiently noticed, and yet it is a just rule, and is fully sustained by authority. Lord Eldon, in the case of Lupton v. White, 15 Ves. 442, states the law of the old decided cases to be, "if one man mixes his corn or flour with that of another and they were of equal value, the latter must have the given quantity: but if articles of a different value are mixed, producing a third value, the aggregate of the whole, and through the fault of the person mixing them, the other party cannot tell what was the original value of his property, he must have the whole." This doctrine is stated with approbation by Kent. 2 Kent's Com. 365. It is again stated in the case of Ryder v. Hathaway. The opinion says, "if they were of equal value, as corn or wood of the same kind, the rule of justice would be obvious. Let each one take his own given quantity. But, if they were of unequal value, the rule would be more difficult."

If no logs were cut upon land owned by the plaintiff, no question could have arisen of confusion of goods. The jury were required by the instructions to find only, that none of those taken by the defendant were cut on the plaintiff's land. They were not required to find that no logs, composing the whole lot of six or seven hundred thousand feet, were cut on the plaintiff's land.

If Preble wrongfully cut any logs on land owned by the plaintiff, and mixed them with logs cut on his own land, so that they could not be distinguished, a question respecting confusion of goods might properly have arisen. The admixture might have been of such a character that the whole lot of logs, including those in

the possession of the defendant, might have become the property of the plaintiff. Or it might have been of such a character, the logs being of equal value, that the plaintiff would have been entitled to recover from any one in possession of those logs or of a part of them, such proportion of them as the logs cut upon his land bore to the whole number.

While the facts reported might not necessarily prove a confusion of goods, if part of the whole lot of logs were cut upon land owned by the plaintiff, they might have been sufficient to raise that question, and to present it for the consideration of the jury.

The instructions, therefore, when considered together, requiring the plaintiff to satisfy the jury that some of that particular portion of the whole lot of logs which the defendant had in his possession were cut upon land owned by the plaintiff, and that no question of confusion of property appeared to arise, were too restrictive. They may have deprived the plaintiff of the right to recover upon proof that some of the logs composing the whole lot had been cut upon his land and so mixed with logs cut on land owned by Preble that they could not be distinguished.

Exceptions sustained, verdict set aside, and new trial granted.[7]

INDISTINGUISHABLE INTERMINGLING.

BRYANT v. WARE.

30 Me. 295. 1849.

The facts are stated in the opinion.

HOWARD, J.—This was an action of *trespass de bonis asportatis*, for a quantity of cedar railroad sleepers, juniper knees, shingles and juniper timber. There was evidence, as stated in the exceptions, tending to show that the lumber was cut in the winter of 1840-41, by Samuel Potter, a trespasser, on two contiguous tracts of land, and hauled into a brook, to be floated down to a market. That one of the tracts of land was owned by the defendant, and that the other, called the college land, was owned by Timothy Boutelle. That in the spring following, the timber was run down to the Penobscot river and rafted into eleven rafts, six of which were

[7] See Childs' Personal Property, §§ 284, 285.

run to Bangor, immediately after by Potter, and "delivered to the plaintiff to pay him what Potter owed him, and the balance to be paid to Potter" (the plaintiff having supplied Potter while cutting the lumber). "That Potter was a trespasser on both lots, on which he cut the timber;" and that "there was no other intermingling of the timber cut from both tracts, except that the logs were hauled into the same brook, at the same landing, and afterwards rafted into the same rafts, there being no marks on any of the timber."

The defendant took the five rafts at Oldtown, as his property, and soon after took the remaining six rafts out of the possession of the plaintiff, at Bangor.

The instructions to the jury, to which exceptions were taken and urged in the argument, were:

1. That, if a part of the lumber was cut on the defendant's land, and a part on the college land, and the whole was mixed together in such a manner, by those who cut it, that it could not be distinguished, the defendant had a right to take the whole, and that this action of trespass could not be maintained.

2. That if the defendant did take the five rafts at Oldtown, and if they amounted to more than all of the timber cut from his land, it would make no difference where he took it, if he intended to seize all of the timber cut as before mentioned, if they found that it was intermingled, and could not be distinguished as before stated.

If one take the goods of another, as a trespasser, he does not thereby acquire a title to them, and cannot invest another with a title; but the original owner may follow his property and reclaim it from the trespasser, or any other person claiming through him, so long as the identity can be established.

If the timber taken by Potter, as a trespasser, from the land of the defendant, was so mingled with the other timber taken by him from the college land, that it could not be distinguished, it would produce what is denominated a confusion of goods. Loomis v. Green, 7 Greenl. 393; Wingate v. Smith, 20 Me. 287; Hazeltine v. Stockwell, 30 Maine 237; Ryder v. Hathaway, 21 Pick. 298; Willard v. Rice, 11 Metc. 493; Betts v. Lee, 5 Johns. 348; Curtis v. Groat, 6 Johns. 168; Babcock v. Gill, 10 Johns. 287; Brown v. Sax, 7 Cowen 95; Treat v. Barber, 7 Conn. 280; Barron v. Cobleigh, 11 N. H. 558.

Where the confusion or commixture of goods is made by consent of the owners, or by accident, and without fault, so that they cannot be distinguished, but the identity remains, each is entitled to his proportion.

This was also the doctrine of the civil law. (Just. Inst. Lib. 2, tit. 1, Par. 27, 28.)

But if such intermixture be wilfully or negligently effected by one, without the knowledge or approbation of the other owner, the latter would be entitled by the common law to the whole property, without making satisfaction to the former for his loss. The civil law, however, required the satisfaction to be made. Browne's Civil Law, 243; Ward v. Ayre, Cro. Jac. 366; 2 Black. Com. 405; 2 Kent. Com. 363, 364, where the civil law is stated differently by the learned Chancellor, page 364; Story's Com. on Bailments, Par. 40; Lupton v. White, 15 Vesey 440; Hart v. Ten Eyck, 2 Johns. Chan. 62.

If the defendant found his timber, which had been wrongfully taken from his land, mingled with other timber, in the manner stated in the evidence, so that it could not be distinguished, he had clearly a right to take possession of the whole, without committing an act of trespass, even if he may be held to account to the true owner for a portion of it. He had, at least, a common interest in the property, and in taking possession he asserted only a legal right. Inst. Lib. 2, tit. 1, Par. 28; Story's Com. on Bailments, Par. 40.

In any view of the case, upon the facts presented, the instructions were correct.

Exceptions overruled.[8]

WILFUL INTERMINGLING.

JENKINS et al. v. STEANKA.

19 Wis. 126, 88 Am. Dec. 675. 1865.

[Action to recover a quantity of lumber, or the value thereof ($400), together with damages for detention, it being alleged that the lumber was manufactured from logs cut on the plaintiff's land by one Wright and wilfully intermingled with other lumber of an inferior quality belonging to said Wright. Steanka, the master of a sloop in which the lumber was found when seized by the sheriff, claimed possession by right of a lien for freight. The jury found such right to possession in Steanka; that title was in Wright; that the value was $360; damages nominal. Judgment was rendered accordingly and the plaintiffs appealed.]

[8] See Childs' Personal Property, § 286.

By the Court, DOWNER, J.—This is an action to recover forty thousand feet of pine lumber, alleged in the complaint to be wrongfully detained by the defendant, and of the value of $400. The value is not denied by the answer. At the trial, the plaintiffs offered to prove the value less than $400; but the circuit court refused to permit the evidence to be given, holding that the pleadings fixed and were conclusive as to the amount of value. In this the court below erred. In actions of trover, trespass or replevin, before the code, it was not necessary for the defendant to deny the amount of the value or the allegation of damages, and in this respect the code has not altered the practice. They must be proved even though the defendant puts in no answer. Conness v. Main, 2 E. D. Smith 314; McKenzie v. Farrell, 4 Bosworth 202.

Questions were put to different witnesses by the plaintiff, during the progress of the trial, as to what the kind or quality of the lumber in dispute was. The court below refused to permit these questions to be answered. It seems to us the answers should have been received. They were competent as bearing on the question of the value of the lumber; also for another purpose. Testimony was given tending to prove that some part of the lumber in dispute was manufactured by one Wright in his mill, at Fremont, out of logs belonging to the plaintiffs and cut on streams above Fremont, and that there was a great difference in the quality of lumber sawed out of logs cut at or near Fremont and that cut out of the plaintiffs' logs, the latter being much superior in quality to the former. The defendants' witnesses, or some of them, testified that this lumber was made out of logs cut at Fremont. After this testimony was in, the plaintiffs renewed their inquiry as to the quality of the lumber in dispute, and the court again ruled the evidence inadmissible. It seems to us that it was clearly admissible as tending to prove whether the lumber in dispute was manufactured out of the plaintiffs' or Wright's logs.

The circuit court also erred in instructing the jury that "if they found for the plaintiffs, they could only recover the amount of lumber which they have proved to have been wrongfully taken by Wright, although it may have been commingled with the lumber or Wright wrongfully." The law, we think, is that if Wright wilfully or indiscriminately intermixed the lumber sawed from the logs of the plaintiffs with his own lumber, so that it could not be distinguished, and the lumber so mixed was of different qualities or value, then the plaintiffs would be entitled to hold the whole. Willard v. Rice, 11 Met. 493; 2 Kent's Com. (3d. ed.), 364; Ryder v. Hathaway, 21 Pick. 298.

We do not deem it necessary to notice other rulings assigned for error of the court below excluding testimony, as the same questions may not arise upon a new trial.

Judgment of the court below reversed, and a new trial ordered.[9]

ST. PAUL BOOM CO. v. KEMP.

125 Wis. 138, 103 N. W. 259. 1905.

Replevin to recover logs and timber.

[The plaintiff boom company, whose business it was to gather stray logs in the river and hold them for the owners, had in its possession in the Mississippi river, near Prescott, Wisconsin, a brail of sixty-three logs, which, when sawed into lumber, would make about 8,000 feet. One James Hackett wilfully dispossessed the boom company of the logs and sold them to the defendant, who, it appears, bought them with full knowledge that they were wrongfully taken from the plaintiff company. The defendant sawed some of the logs into lumber (about 6,000 feet), and intermingled it with other lumber in his yard. Under a writ of replevin the plaintiff reclaimed and the officer took possession of some of the uncut logs and about 20,000 feet of lumber, some of which was sawed from the plaintiff's logs.

Judgment for the plaintiff for the entire quantity of logs uncut, together with the 20,000 feet of lumber. Defendant appealed.]

SIEBECKER, J. * * * It appears from the opinion of the trial court that it concluded that the fact was undisputed in the case. It appeared that Hackett had no title to or interest in the logs when he sold them to appellant; that appellant had no knowledge or information to the effect that Hackett was a dealer in logs or lumber or that he was in any way engaged in the lumber business; and that appellant purchased the brail of logs for the sum of $19.50, when he well knew that they were worth a much larger sum in the market. The jury's findings that he had good reason to believe at the time he purchased the logs that Hackett had secured possession of them wrongfully, that he had been informed on the day of purchase that they had been wrongfully and forcibly taken from the boom

[9] See Childs' Personal Property, § 285.

company, and that it claimed them as its property under arrangements with the original owners, and warned and notified him not to manufacture them into lumber, were all well supported by the evidence. * * * It also appeared in evidence that lumber bearing the log marks was intermingled with other lumber in piles, which, under the finding of the jury, must have contained a much larger quantity than the logs yielded. This state of the evidence left no basis for a finding that there was no intentional confusion of this lumber with that of appellant. * * *

When the verdict had been so framed the court awarded judgment in respondent's favor for the recovery of the logs and lumber seized by the officer, and for costs. It is contended that this is error. The jury found that the brail of logs contained 8,000 feet of manufactured lumber, that the total value of the logs was $120, and that the quantity recovered by respondent was worth $30, which on the basis of valuation found by the jury, would be one-fourth of the whole amount; thus showing that three-fourths of the logs had been manufactured into lumber, which, upon this calculation, amounted to 6,000 feet. The officer seized 20,000 feet of the manufactured lumber, or 14,000 feet in excess of the amount the logs yielded. The trial court awarded judgment for the recovery of the whole amount seized by the officer, upon the ground that a wrongful confusion of goods operates as a forfeiture of the interest of the wrongdoer in all of the goods so intermixed. To operate such a forfeiture it must appear that the lumber manufactured out of the respondent's logs and that of appellant with which it was mixed were so different in description, quality, and value that the whole mass could not be ratably apportioned in proportion to the quantities contributed to the whole mass by the original owners. The evidence does not tend to show that there was a difference in description, quality and value of the lumber so mixed. There is nothing to show that such an apportionment could not be made, and that respondent would not be fully compensated for its damage by having its proportion of the whole mass restored to it. The legal principle governing such a situation is stated by Judge Cooley in terms as follows:

"Even if the commingling were malicious or fraudulent, a rule which would take from the wrongdoer the whole, when to restore the other his proportion would do him full justice, would be a rule wholly out of harmony with the general rules of civil remedy, not only because it would award to one party a redress beyond his

loss, but also because it would compel the other party to pay, not damages, but a penalty." Cooley, Torts, 53. * * *

We are constrained to hold that the judgment is erroneous, in that it awarded to respondent the right to hold and retain the logs and 20,000 feet of lumber seized by the officer under the writ of replevin. Respondent was entitled to the logs seized, and to its full proportion out of the entire quantity of lumber seized, namely, 6,000 feet, and the costs of the action; and appellant was entitled to a return of the excess of the lumber so seized; or, if the lumber could not be returned, to its value, without any damages for the seizure of such excess under the writ of replevin. * * *

By the Court.—The judgment of the circuit court is hereby reversed. * * *[10]

INNOCENT OR ACCIDENTAL INTERMINGLING.

GATES v. RIFLE BOOM CO.

70 Mich. 309, 38 N. W. 245. 1888.

The facts are stated in the opinion.

MORSE, J.—The plaintiff, in his lumbering operations, in 1882 cut over the line upon the adjoining land of Rust Bros. & Co., and thereby secured and marked as his own about 135,000 feet of logs belonging to the latter. These logs were mixed with the other logs of plaintiff, and banked on the west branch of the Rifle river. They were not run out the following spring, but remained in the rollway during the summer and fall of 1883. In that year Rust Bros. & Co. sent some scalers where the plaintiff's logs were, who selected out, as best they could, logs of the same quality as those taken from the Rust lands by plaintiff, and about the same quantity, and marked them with the stamp of Rust Bros. & Co. Such logs then bore two brands, the mark of plaintiff, "C. O. W.," and the Rust mark, "7 R. 7." Under the usual contract by plaintiff with the defendant boom company these logs, intermingled with other logs of the plaintiff, were driven down the stream in the summer of 1884, and received in the defendant's boom. The defendant was notified by Rust Bros. & Co. not to deliver the logs with the double marks upon

[10] See Childs' Personal Property, § 285.

them to plaintiff. The boom company thereupon delivered the double-marked logs, about 155,000 feet, to Rust Bros. & Co., who, finding that more were marked by their scalers than they were entitled to, returned to plaintiff 20,590 feet of the same. The plaintiff, after demanding these logs of the boom company, and after their refusal to deliver them, brought this suit in trover in the circuit court for the county of Bay. The cause was then tried before a jury, and verdict and judgment passed for the defendant. * * *

It was claimed by the plaintiff upon the trial, and he so testified, that the logs taken by Rust Bros. & Co. were of greater value in quality than those cut by him from their lands. The quantity cut by him on the Rust lands was not claimed to be less than the quantity taken by Rust Bros. & Co. It therefore became material to ascertain, upon the trial, whether the defendant was a willful trespasser, or cut the logs innocently, in good faith, believing that he was within the lines of his own land. The court instructed the jury as to the difference between a willful and an unintentional trespass, stating to them, in substance, that if the trespass was a willful one, if Gates knew he was cutting the logs of Rust Bros. & Co., and so, knowing them not to be his, intermingled them with his own so that they could not be distinguished, Rust Bros. & Co. had a right to take more than their own, and if, in order to get all that belonged to them, and without intending to take more than belonged to them, they did take a better quality of logs than they had lost, if they did not make the selection with that view, the plaintiff could not recover for such excess in quality; but if the plaintiff cut the logs, and marked and mingled them with his own, in good faith, believing them to be his own, then if Rust Bros. & Co. took more than they were entitled to, the plaintiff might recover the excess. The counsel for the plaintiff very ably and forcibly contended in the argument here that if the plaintiff was innocent of any wrong, he was entitled to recover in this action, if Rust Bros. & Co. took no more logs in quality or quantity than were cut upon their lands, the difference between the value of the logs and the value of the standing timber, that Rust Bros. & Co. could claim no more than the value of the stumpage. * * * He claims that in this case the plaintiff added innocently to the value of this timber the cost of cutting and putting in the logs, which was the sum of $2.25 per thousand feet, and also the value of the driving and booming charges. He estimates this value at over $300. But in the first place it seems to me that this amount, the value of the plaintiff's labor and expenses upon the logs, could not be recovered in an action

of trover. The logs were still the property of Rust Bros. & Co. The trespasser, however innocent, could acquire no property in these logs, nor could he acquire a lien upon them for such labor and expense. The conversion of trees into saw-logs by a trespasser does not change the title to the property, nor destroy the identity of the same. The owner of the land is the owner of the logs, and the trespasser has no title to them. Therefore when he regains his own, he has converted no property of the trespasser to his own use. Stephenson v. Little, 10 Mich. 433; Final v. Backus, 18 Mich. 218-232; Mining Co. v. Hertin, 37 Mich. 337; Arpin v. Burch (Wis.), 32 N. W. Rep. 681; Winchester v. Craig, 33 Mich. 205; Grant v. Smith, 26 Mich. 201; Tuttle v. White, 46 Mich. 485, 9 N. W. Rep. 528. * * * There can be no doubt that the rule is well settled in this state that if Rust Bros. & Co. had taken possession of these logs while they were lying upon their lands, they would have been entitled to them as they were, and that no claim could have been made against them by the plaintiff for the labor and expense of cutting them. The identity of the timber would not then have been destroyed, and the subsequent intermingling of these logs with the logs of plaintiff, although innocently done, could not change the rights of the owners. The evidence shows that between the time Rust Bros. & Co. discovered the trespass and the time they took possession of the logs by marking them, no labor or money was expended by the plaintiff upon them. Therefore it follows that as this case stood the plaintiff had no claim upon Rust Bros & Co. that he could enforce in this action, unless they took possession of a better quality of logs than he cut upon their premises and the same amount or more in quantity, and his trespass and intermingling of the property was innocently done. And the court was right in his interpretation of the law as to innocent trespassers. The seeming injustice pointed out in the argument of the plaintiff's counsel is not an injustice, but the result of the election of the owner to take less than he is by law entitled to. The owner of standing timber is not only entitled to the timber, but he has a right to it as it is, and to keep it uncut if he so desires. No man, however innocently he may do it, can go upon his land and convert the standing trees into logs and charge him for the labor thus expended against his will, and perhaps against his real benefit. He may prefer to have the timber to stand, and if left standing a few years may bring him immense profit. Such instances have not been rare in the history of pine timber in this state. The supposed enhancement of his property by the labor of the trespasser may thus turn

out to be a positive injury. There is no injustice in holding that the trespasser must lose the labor he has expended in converting another's trees into logs. Such trespasses, though casual and not willful, are ordinarily, as was the trespass in this case, the result of negligence upon the part of the trespasser, and there is no good reason why he should be recompensed for labor and expenses incurred in the trespass when it might have been avoided by proper diligence. The owner has the right to reclaim his logs, but if he sees fit to bring an action of trespass or trover instead of regaining his property he voluntarily puts himself within the rule of damages prevailing in such actions, and thereby elects to receive only a just and fair compensation for his property as it was before the trespasser intermeddled with it. The trespasser cannot complain of this, neither can he complain if he elects to take his property if he can find it. As was well said in Mining Co. v. Hertin, *supra:* "Nothing could more encourage carelessness than the acceptance of the principle that one who by mistake performs labor upon the property of another should lose nothing by his error." * * *

The judgment of the court below must therefore be affirmed, with costs.[11]

SHERWOOD, C. J., and CHAMPLIN and LONG, JJ., concurred. CAMPBELL, J., did not sit.

PICKERING v. MOORE.

67 N. H. 533, 32 Atl. 828, 68 Am. St. Rep. 695, 31 L. R. A. 698. 1894.

Action of trover for manure.

The facts as stated by the court are as follows:

March 31, 1883, the defendant leased his farm for the term of three years to the plaintiff, who covenanted to carry on the place in a husband-like manner, and to consume and convert into manure, to be used or left upon the premises, all hay and fodder raised thereon. The plaintiff occupied the farm, and performed all his covenants contained in the lease, without any new or further contract, until May 30, 1892. During the last year of his occupancy he fed out upon the farm a large quantity of fodder not pro-

[11] See Childs' Personal Property, § 286.

duced on the place. He put 25 cords of the manure made from this fodder, and manure of the same quality and value made from fodder raised on the place, together in a heap, where they were so intermixed that they could not be distinguished. The defendant prevented him from taking away the 25 cords.

CARPENTER, J.—The plaintiff held the farm after the expiration of three years as tenant from year to year, upon the terms expressed in the lease. * * * Manure made upon a farm by the consumption of its products in the ordinary course of husbandry is a part of the realty. It cannot be sold or carried away by a tenant without the landlord's consent. Sawyer v. Twiss, 26 N. H. 345, 349; Perry v. Carr, 44 N. H. 118, 120; Hill v. De Rochemont, 48 N. H. 87, 88. * * * Whether a tenant, "where there is no positive agreement dispensing with the engagement to cultivate his farm in a husband-like manner, is bound to spend the hay and other like produce upon it as the means of preserving and continuing its capacity" (Perry v. Carr and Hill v. De Rochemont, *supra*), * * * is a different, and possibly an open, question. * * * However that may be, no rule of good husbandry requires a tenant to buy hay or other fodder for consumption on the farm. If, in addition to the stock maintainable from its products, he keeps cattle for hire, and feeds them upon fodder procured by purchase, or raised by him on other lands, the landlord has no more legal or equitable interest in the manure so produced than he has in the fodder before it is consumed. It is not made in the ordinary course of husbandry. * * *

The plaintiff did not lose his property in the manure by intermixing it with the defendant's manure, of the same quality and value, without his consent. It is not claimed that the plaintiff mixed the manure with any fraudulent or wrongful intent. "The intentional and innocent intermixture of property of substantially the same quality and value does not change the ownership. And no one has a right to take the whole, but, in so doing, commits a trespass on the other owner. He should notify him to make a division, or take his own proportion at his peril, taking care to leave to the other owner as much as belonged to him." * * * "Even if the commingling were malicious or fraudulent, a rule of law which would take from the wrongdoer the whole, when to restore to the other his proportion would do him full justice, would be a rule not in harmony with the general rules of civil remedy, not only because it would award to one party a redress beyond his loss, but because

it would compel the other party to pay, not damages but a penalty." Cooley, Torts, 53, 54.

Whether the parties were tenants in common of the manure is a question that need not be determined. * * * Assuming that they were, the action may be maintained. A tenant in common has the same right to the use and enjoyment of the common property that he has to his sole property, except in so far as it is limited by the equal right of his cotenants. Where two have each an equal title to an indivisible chattel, "as of a horse, an ox, or a cow," neither, without actual and exclusive possession of the chattel, can enjoy his moiety. Simultaneous enjoyment by each of his equal right is impossible. * * * Until an adjudication of their rights, neither can assert a title in severalty to any portion of the property. When the common property is divisible, by weight, measure, or number, into portions identical in quality and value, as corn and various other articles, a different case is presented. There is no question of legal or equitable right. There is, and can be, no dispute that a court of law or equity can settle. Counting, weighing, and measuring are not judicial, but ministerial, functions. Equity could do no more than decree that each might take so many pounds, bushels, or yards, or so many of the articles in number, and enforce its decree by process,—in other words, enforce the conceded right. One may, in general, do without a decree what equity would decree that he might do. Neither law nor equity allows one, in the exercise of his own rights, to do an unnecessary and avoidable injury to another. One is entitled to the possession of the whole in those cases only where it is necessary to his enjoyment of his moiety. Here it is not necessary. There is no more difficulty in separating one portion from another than there is in selecting A.'s marked sheep from B.'s flock. Either may make the division. The law is not so unreasonable as to compel a resort to the courts in order to obtain a partition which either may make without expense, and without danger of injustice to his cotenant. Except in Daniels v. Brown, 34 N. H. 454, it has never been held, so far as observed, that a tenant in common is liable to his cotenant, in any form of proceeding, for taking from the latter's possession, and consuming or destroying his just proportion, only, of the common property. * * * A tenant in common of goods divisible by tale or measure may, without the consent and against the will of his cotenant, rightfully take and appropriate to his sole use, sell, or destroy, so much of them as he pleases, not exceeding his share, and by so doing effect, *pro tanto,* a valid partition. To this extent,

Daniels v. Brown, *supra*, is overruled. Haley v. Colcord, 59 N. H. 8; * * * The defendant, by preventing the plaintiff from taking his part of the manure, exercised a dominion over it inconsistent with the plaintiff's rights. Evans v. Mason, 64 N. H. 98, 5 Atl. 766.

Judgment for the plaintiff.[12]

WALLACE, J., did not sit. The others concurred.

[12] See Childs' Personal Property, § 286.

CHAPTER X.

HOW PROPERTY CEASES TO EXIST.

POLICE POWER—NATURE OF.

SLAUGHTER-HOUSE CASES.

(The Butchers' Benevolent Association of New Orleans v. The Crescent City Live-Stock Landing and Slaughter-House Company.)

83 U. S. 36, 21 L. Ed. 394. 1872.

The facts are stated in the opinion.

MILLER, J.—These cases are brought here by writs of error to the supreme court of the state of Louisiana. They arise out of the efforts of the butchers of New Orleans to resist the Crescent City Live-Stock Landing & Slaughter-House Company in the exercise of certain powers conferred by the charter which created it, and which was granted by the legislature of that state.

The cases named above, with others which have been brought here and dismissed by agreement, were all decided by the supreme court of Louisiana in favor of the Slaughter-House Company, as we shall hereafter call it for the sake of brevity, and these writs are brought to reverse those decisions.

The records were filed in this court in 1870, and were argued before it at length on a motion made by plaintiffs in error for an order in the nature of an injunction or *supersedeas*, pending the action of the court on the merits. The opinion on that motion is reported in 10 Wall. 273, 19 L. Ed. 915. * * *

The records show that the plaintiffs in error relied upon, and asserted throughout the entire course of the litigation in the state courts, that the grant of privileges in the charter of defendant, which they were contesting, was a violation of the most important provisions of the 13th and 14th articles of Amendment of the Constitution of the United States. The jurisdiction and the duty of

this court to review the judgment of the state court on those questions is clear and is imperative.

The statute thus assailed as unconstitutional was passed March 8, 1869, and is entitled "An Act to Protect the Health of the City of New Orleans, to Locate the Stock-landings and Slaughter-houses, and to Incorporate the Crescent City Live-Stock Landing and Slaughter-House Company."

The 1st section forbids the landing or slaughtering of animals whose flesh is intended for food, within the city of New Orleans and other parishes and boundaries named and defined; or the keeping or establishing any slaughter-houses or *abattoirs* within those limits except by the corporation thereby created, which is also limited to certain places afterwards mentioned. Suitable penalties are enacted for violations of this prohibition. * * *

It declares that the company, after it shall have prepared all the necessary buildings, yards, and other conveniences for that purpose, shall have the sole and exclusive privilege of conducting and carrying on the live-stock landing and slaughter-house business within the limits and privilege granted by the act, and that all such animals shall be landed at the stock landing and slaughtered at the slaughter-houses of the company, and nowhere else. Penalties are enacted for infractions of this provision, and prices fixed for the maximum charges of the company, for each steamboat and for each animal landed.

Section 5 orders the closing up of all other stock-landings and slaughter-houses after the first day of June, in the parishes of Orleans, Jefferson, and St. Bernard, and makes it the duty of the company to permit any person to slaughter animals in their slaughter-houses under a heavy penalty for each refusal. Another section fixes a limit to the charges to be made by the company for each animal so slaughtered in their building, and another provides for an inspection of all animals intended to be so slaughtered, by an officer appointed by the governor of the state for that purpose. * * *

It is not, and cannot be successfully controverted, that it is both the right and the duty of the legislative body, the supreme power of the state or municipality, to prescribe and determine the localities where the business of slaughtering for a great city may be conducted. To do this effectively it is indispensable that all persons who slaughter animals for food shall do it in those places and nowhere else. * * *

The power here exercised by the legislature of Louisiana is, in

its essential nature, one which has been, up to the present period in the constitutional history of this country, always conceded to belong to the states, however it may now be questioned in some of its details.

Unwholesome trades, slaughter-houses, operations offensive to the senses, the deposit of powder, the application of steam power to propel cars, the building with combustible materials, and the burial of the dead, may all," says Chancellor Kent, 2 Com. 340, "be interdicted by law, in the midst of dense masses of population, on the general and rational principle, that every person ought so to use his property as not to injure his neighbors; and that private interests must be made subservient to the general interests of the community." This is called the police power; and it is declared by Chief Justice Shaw that it is much easier to perceive and realize the existence and sources of it than to mark its boundaries, or prescribe limits to its exercise. Com. v. Alger, 7 Cush. 84.

This power is, and must be from its very nature, incapable of any very exact definition or limitation. Upon it depends the security of social order, the life and health of the citizen, the comfort of an existence in a thickly populated community, the enjoyment of private and social life, and the beneficial use of property.

"It extends," says another eminent judge, "to the protection of the lives, limbs, health, comfort and quiet of all persons, and the protection of all property within the state; * * * and persons and property are subjected to all kinds of restraints and burdens in order to secure the general comfort, health and prosperity of the state. Of the perfect right of the legislature to do this no question ever was, or, upon acknowledged general principles, ever can be made, so far as natural persons are concerned." Thorpe v. Rut. & B. R. Co., 27 Vt. 149.

"The regulation of the place and manner of conducting the slaughtering of animals, and the business of butchering within a city, and the inspection of the animals to be killed for meat, and of the meat afterwards, are among the most necessary and frequent exercises of this power. It is not, therefore, needed that we should seek for a comprehensive definition, but rather look for the proper source of its exercise. * * *

The exclusive authority of state legislation over this subject is strikingly illustrated in the case of New York v. Miln, 11 Pet. 102. In that case the defendant was prosecuted for failing to comply with a statute of New York which required every master of a vessel arriving from a foreign port, into that of New York city, to report

the names of all his passengers, with certain particulars of their age, occupation, last place of settlement, and place of their birth. It was argued that this act was an invasion of the exclusive right of congress to regulate commerce. And it cannot be denied that such a statute operated at least indirectly upon the commercial intercourse between the citizens of the United States and of foreign countries. But notwithstanding this it was held to be an exercise of the police power properly within the control of the state, and unaffected by the clause of the Constitution which conferred on congress the right to regulate commerce. * * *

It cannot be denied that the statute under consideration is aptly framed to remove from the more densely populated part of the city the noxious slaughter-houses, and large and offensive collections of animals necessarily incident to the slaughtering business of a large city and to locate them where the convenience, health, and comfort of the people require they shall be located. And it must be conceded that the means adopted by the act for this purpose are appropriate, are stringent and effectual. But it is said that, in creating a corporation for this purpose, and conferring upon it exclusive privileges—privileges which it is said constitute a monopoly—the legislature has exceeded its power. If this statute had imposed on the city of New Orleans precisely the same duties, accompanied by the same privileges, which it has on the corporation which it created, it is believed that no question would have been raised as to its constitutionality. * * *

It may, therefore, be considered as established, that the authority of the legislature of Louisiana to pass the present statute is ample, unless some restraint in the exercise of that power be found in the Constitution of that state or in the amendments to the Constitution of the United States, adopted since the date of the decisions we have already cited. * * *

The plaintiffs in error accepting this issue, allege that the statute is a violation of the Constitution of the United States in these several particulars:

That it creates an involuntary servitude forbidden by the 13th article of amendment;

That it abridges the privileges and immunities of citizens of the United States;

That it denies to the plaintiffs the equal protection of the laws; and,

That it deprives them of their property without due process of

law; contrary to the provisions of the 1st section of the 14th article of amendment.[1]

(The court, after deciding these propositions in the negative, affirmed the decision of the Supreme Court of Louisiana.

MR. CHIEF JUSTICE CHASE, MR. JUSTICE FIELD, MR. JUSTICE SWAYNE, and MR. JUSTICE BRADLEY dissented.)

SLEEPING CAR BERTHS.

STATE v. REDMON.

134 Wis. 89, 114 N. W. 137, 14 L. R. A. (N. S.) 1003. 1907.

The facts as stated by the court are as follows:

The first action was for a violation of chapter 266, p. 402, Laws 1907, September 5, 1907, and the second for a violation thereof August 26, 1907. The person whose rights under such law were violated in the latter was a passenger between points within the state, and the one in the former was an interstate passenger.

The report shows that defendant was convicted in each case in due form of law, and the existence of all circumstances necessary to raise the question of whether the enactment, supposed to warrant the prosecution, is constitutional. The purpose of the report is to obtain a determination of such question, These facts with others are in substance stated: The sleeping car in question was divided into a stateroom, a smoking room and 12 sections, each of such sections containing a double upper and lower berth arranged in the usual way common to ordinary Pullman sleeping cars. The price charged for a berth varied somewhat according to distance and time of use. The price in the first case was $1.50, and in the second $2. Prior to the passage of the law it had been customary upon making up the lower berth for use of a customer to let down the upper berth, whether it had been theretofore engaged or not, and to prepare it, in whole or in part, for occupancy and to use it for sleeping or other purposes. The complainant in each case engaged and paid for a double lower berth and ordered the accused, who was the porter of the car, to leave the upper berth closed, since it had not been sold and there was no one to occupy it. The porter

[1] See Childs' Personal Property, §§ 265, 324.

nevertheless, following the usual custom, under orders from his employer, let down the upper berth, notifying the complainant that he was required to do that unless such berth was paid for.

The law in question is as follows:

"An act * * * relating to the health and comfort of occupants of sleeping car berths.

"The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:

"1. Whenever a person pays for the use of a double lower berth in a sleeping car, he shall have the right to direct whether the upper berth shall be open or closed, unless the upper berth is actually occupied by some other person; and the proprietor of the car and the person in charge of it shall comply with such direction.

"2. Any person or corporation violating the provisions of this act shall be punished by imprisonment in the county jail not more than six months, or by a fine not exceeding one hundred dollars."

Marshall, J.—It is conceded that the legislation in question was an attempt to exercise the police power of the state which is inherent in sovereign authority under such limitations as exist in the national and state constitutions, and that if as a police regulation it is not legitimate it is not the law though possessing the form thereof. * * *

The idea is found expressed now and then, that the police power is something not dealt with or affected by the Constitution, at least in any marked degree, which is a mistake hardly excusable. The error suggested here and there, that the police power is "a sovereign power in the state, to be exercised by the legislature, which is outside, and in a sense above, the Constitution (Donnelly v. Decker, 58 Wis. 461, 17 N. W. 389, 46 Am. Rep. 637), and that a police regulation which is clearly a violation of express constitutional inhibition is legitimate, subject to a judicial test as to reasonableness * * * and others of a similar character now and then found in legal opinion and text-books, are highly misleading" and have been distinctly discarded by this court. State *ex rel.* Milwaukee Medical College v. Chittenden, 127 Wis. 468-521, 107 N. W. 500. As was there said, "If it were true that all police regulations are legitimate which are reasonable, and all are reasonable which the legislature so wills, the Constitution as to very much of the field of civil government would be of no use whatever. The contrary has been the rule without any legitimate question since Marbury v. Madison, 1 Cranch (U. S.) 137, 2 L. Ed. 60."

The following significant expressions of this court as to the constitutional limitations in the exercise of the police power leave nothing further to be said on the subject:

"As the police power imposes restrictions and burdens upon the natural and private rights of individuals, it necessarily depends upon the law for its support; and, although of comprehensive and far-reaching character, it is subject to constitutional restrictions. * * *" State *ex rel.* Adams v. Burdge, 95 Wis. 390-398, 70 N. W. 347, 349, 37 L. R. A. 157, 60 Am. St. Rep. 123. * * *

"The police power has been wittily defined as the power to pass unconstitutional laws, and some utterances of courts have seemed to justify such conception. It is nevertheless erroneous. An act which the Constitution clealy prohibits is beyond the power of the legislature, however proper it might be as a police regulation but for such prohibition." State *ex rel.* Jones v. Froehlich, 115 Wis. 32-42, 91 N. W. 115, 118, 58 L. R. A. 757, 95 Am. St. Rep. 894.

"So legislation referring to police authority for legitimacy, like any other exercise of the law-making power, must bear the test of constitutional limitations, which will be found upon all sides. * * *

The police power is so obviously essential to the public welfare that it is presumed the framers of the Constitution did not intend to prohibit its exercise where reasonably necessary therefor, though such exercise might invade the scope, viewing the language in the literal sense, of some fundamental prohibition, as that against taking property for public use without rendering just compensation therefor. So it is said that a law authorizing the destruction by public authority of private property without the owner's consent, where necessary to prevent the spread of a contagious disease, is legitimate not because the police power is above or superior to or not dealt with by the Constitution, but because it was not intended to deal with the suggested situations by such express prohibition. Therefore the law is not to be regarded as a violation thereof, though if the field of reasonable necessity were exceeded that of the prohibition would be invaded. * * * So a police regulation, correctly speaking, is no more legitimate than a law in any other field if it in fact violates any principle entrenched in the Constitution.

What is this police power about which so much is said, and which is so commonly, and generally speaking, legitimately invoked as a justification for legislation regulating the affairs of life? In view of the multiplication of legislative enactments hedging the

citizen about as to many of such affairs and in a manner quite novel as compared with former conditions, it is quite important that the character of that broad power and its limitations by the fundamental law should be as accurately understood as practicable.

Many attempts have been made to define police power. There is good reason to say that the multitude of such attempts, with the many variations in phrasing the matter, have not added very much to the simple expression that it is the power to make all laws which, in contemplation of the Constitution, promote the public welfare. That both defines the power and states the limitations upon its exercise, it being understood that it is a judicial function to determine the proper subject to be dealt with, and that it is a legislative function, primarily, to determine the manner of dealing therewith, but ultimately a judicial one to determine whether such manner of dealing so passes the boundaries of reason as to overstep some constitutional limitation, express or implied.

This court, in common with others, has said that the police power extends to legislation regulating, reasonably, that is to an extent not entering the realms of the destructive, all matters appertaining to the lives, limbs, health, comfort, good morals, peace and safety of society. Baker v. State, 54 Wis. 368-372, 12 N. W. 12; State *ex rel.* Larkin v. Ryan, 70 Wis. 676-681, 36 N. W. 823; State v. Heinemann, 80 Wis. 253, 49 N. W. 818, 27 Am. St. Rep. 34; Bittenhaus v. Johnson, 92 Wis. 588, 66 N. W. 805, 32 L. R. A. 380; State *ex rel.* Kellogg v. Currens, 111 Wis. 431, 87 N. W. 561, 56 L. R. A. 252. Again this court said, by way of approval of expressions of standard authors and opinions in leading cases, the police power includes "all laws for the protection of life, limb and health, for the quiet of the person and for the security of property." "All persons and property are subjected to all necessary restraints and burdens to secure the general comfort, health and prosperity of the state." "It is co-extensive with self-protection and is not inaptly termed 'the law of necessity.' It is that inherent and plenary power in the state which enables it to prohibit all things hurtful to the comfort and welfare of society." State *ex rel.* Adams v. Burdge, 95 Wis. 390-398, 70 N. W. 347, 37 L. R. A. 157, 66 Am. St. Rep. 123. These and many other similar phrasings, meaning the same thing, are far from being entirely satisfactory. They are misleading to one who reads them without having in mind the idea that all legislative regulations of human affairs interfering with personal liberty or other private rights, to be legitimate,

tested by constitutional limitations, must be reasonably for the public benefit.

It were better to always say that the police power extends to and permits legislation regulating reasonably matters appertaining to the public welfare, since anything beyond that must necessarily fall at the threshold of some constitutional defense. It is a great power, having more to do with the well-being of society than any other, yet one which if exercised autocratically would supersede some of the most cherished principles of constitutional freedom. It may be extended disastrously, or restrained and administered beneficially, according as the judiciary shall perform its constitutional functions. Confined within its legitimate field of reasonable regulation it is essential, as we have heretofore indicated, to the full accomplishment of the purposes of civil government. * * *

With the foregoing general observations as to the character and limitations upon the police power, we shall proceed to consider, respecting the law in question, these propositions: Is it a police regulation, laying aside for the purposes of the inquiry the question of whether it is within the constitutional field? Second, if it be such a regulation, is it outside the field of reasonable interference with private rights?

The ostensible purpose of the law, as indicated by its title, is to promote the "health and comfort of occupants of sleeping car berths." Words were used in such title *ex industria*, seemingly, to give to the enactment, unmistakably, the character of a police regulation, but a law is not necessarily one to promote the public health and comfort of people generally, or of a legitimate class thereof, merely because such is its declared purpose.

As it is a judicial function to define the proper subjects for the exercise of police power (Town of Lake View v. Rose Hill Cemetery Company, 70 Ill. 191, 22 Am. Rep. 71), it must be to decide, as to any enactment, whether it really relates to a legitimate subject, or under the guise of doing so, violates rights of persons or property. The idea that all legislation is within the police power which the law-making authority determines to be so, and that all which might be within such power is within it if the legislature so determines, is, as we have seen, a heresy, and one which was repudiated sufficient for all time by the early decision, heretofore referred to, in Marbury v. Madison, *supra*, the American classic which first and conclusively defined the general character of the constitutional limitations and the relations of the legislature and the judiciary thereto and to each other. The doctrine there laid

down more than a century ago in the unanswerable logic of Chief Justice Marshall has never been departed from, except accidentally, inconsiderately or ignorantly. * * *

It is not every enactment which will to some extent promote the public health, comfort or convenience, which is legitimate. Otherwise the way would be open for legislative interference with the ordinary affairs of life to an extent destructive of many of the most valuable purposes of civil government. * * *

The doctrine that the police power is really a law of necessity forms the key, it would seem, with which to unlock the mysteries, so far as practicable, of what is within and what is without the limits of such power. Not that a police regulation, in form or pretense, to be one in fact, must supply some absolute essential to the public welfare, but that the exigency to be met must so concern such welfare, be sufficiently vital thereto, as to suggest some reasonable necessity for a remedy affordable only by a legislative enactment, as to efficiently invite public attention thereto, it being regarded as a legislative function to primarily pass upon the matter. No more definite rule can be well worked out except as it may be evolved by the process of inclusion and exclusion in the treatment of cases as they arise. * * *

Now how is it with sleeping cars, as regards whether the upper berths are open or closed when the lower ones are occupied, respecting any substantial danger, inconvenience or discomfort to persons generally patronizing such utilities; danger sufficient to challenge attention as one reasonably requiring for the public interests a remedy? Persons so circumstanced as a rule, we apprehend, are so indifferent as to whether the upper berth is closed or not that they would not seriously think of having it closed at their expense or to the extent of even a small sum. Many probably would prefer to have it open if they were permitted to deposit some of their belongings therein in case of its not being otherwise occupied, which is commonly allowed. That is recognized in the law itself. Had it been thought that there is a substantial reason why, in the public interests, an upper berth should be closed when unoccupied, in case of the lower one being in use, the law would have so provided in all cases, instead of leaving it to the mere dictation, whether springing from judgment or mere whim, of each individual customer for a lower berth, to control the upper one, in respect to the matter. To thus leave such a matter to the mere caprice of the occupant of the lower berth is a confession on the face of the act that it was not treated by the legislature as one deemed to be rea-

sonably vital to the public interests. So the law is not, in reality, a police regulation but an unwarranted intereference with property rights; an attempt in the circumstances specified to give to any person, at his option, who pays for a part of a section in a sleeping car the use, free of charge, of the balance thereof. * * * In the foregoing it is not intended to foreclose the question of whether the scope of police power extends to preventing, as a rule, the letting down of upper berths in sleeping cars when not occupied or engaged, in cases where the lower ones are occupied. * * *

It follows that an arbitrary appropriation in the name of law of the space of an upper berth in a sleeping car for the greater comfort and safety, as regards the health of the occupant of the lower berth, at his option, if such use of such space were reasonably necessary, is highly oppressive. A regulation under the police power securing such privilege, in case of the upper berth not being engaged, by paying for it, would present a different question. * * *

The question submitted for decision in the first case is answered in the negative, and the same question submitted in the second case is likewise answered.[2]

INTOXICATING LIQUORS.

MUGLER v. STATE OF KANSAS.

123 U. S. 623, 8 Sup. Ct. Rep. 273, 31 L. Ed. 205. 1887.

The facts as stated by the court are as follows:

These cases involve an inquiry into the validity of certain statutes of Kansas relating to the manufacture and sale of intoxicating liquors. The first two are indictments, charging Mugler, the plaintiff in error, in one case, with having sold, and in the other with having manufactured, spirituous, vinous, malt, fermented, and other intoxicating liquors, in Saline county, Kansas, without having the license or permit required by the statute. The defendant, having been found guilty, was fined, in each case, $100, and ordered to be committed to the county jail until the fine was paid. Each judgment was affirmed by the Supreme Court of Kansas, and

[2] See Childs' Personal Property, §§ 265, 324.

thereby, it is contended, the defendant was denied rights, privileges, and immunities guarantied by the constitution of the United States. * * * Upon the petition and bond of the defendants, the cause was removed into the circuit court of the United States for the district of Kansas, upon the ground that the suit was one arising under the constitution of the United States. A motion to remand it to the state court was denied. The pleadings were recast so as to conform to the equity practice in the courts of the United States; and, the cause having been heard upon bill and answer, the suit was dismissed. From that decree the state prosecutes an appeal.

By a statute of Kansas, approved March 3, 1868, it was made a misdemeanor, punishable by fine and imprisonment, for any one, directly or indirectly, to sell spirituous, vinous, fermented, or other intoxicating liquors, without having a dram-shop, tavern, or grocery license. It was also enacted, among other things that every place where intoxicating liquors were sold in violation of the statute should be taken, held, and deemed to be a common nuisance; and it was required that all rooms, taverns, eating-houses, bazaars, restaurants, groceries, coffee-houses, cellars, or other places of public resort where intoxicating liquors were sold, in violation of law, should be abated as public nuisances. Gen. St. Kan. 1868, c. 35. But in 1880 the people of Kansas adopted a more stringent policy. On the second of November of that year they ratified an amendment to the state constitution, which declared that the manufacture and sale of intoxicating liquors, should be forever prohibited in that state, except for medical, scientific, and mechanical purposes. In order to give effect to that amendment, the legislature repealed the act of 1868, and passed an act, approved February 19, 1881, to take effect May 1, 1881, entitled "An act to prohibit the manufacture and sale of intoxicating liquors, except for medical, scientific, and mechanical purposes, and to regulate the manufacture and sale thereof for such excepted purposes." * * *

The facts necessary to a clear understanding of the questions, common to these cases, are the following: Mugler and Ziebold & Hagelin were engaged in manufacturing beer at their respective establishments (constructed specially for that purpose), for several years prior to the adoption of the constitutional amendment of 1880. They continued in such business in defiance of the statute of 1881, and without having the required permit. Nor did Mugler have a license or permit to sell beer. The single sale of which he was found guilty occurred in the state, and after May 1, 1881, that

is, after the act of February 19, 1881, took effect, and was of beer manufactured before its passage. The buildings and machinery constituting these breweries are of little value if not used for the purpose of manufacturing beer; that is to say, if the statutes are enforced against the defendants the value of their property will be very materially diminished.

MR. JUSTICE HARLAN.—The general question in each case is whether the foregoing statutes of Kansas are in conflict with that clause of the fourteenth amendment, which provides that "no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law." That legislation by a state prohibiting the manufacture within her limits of intoxicating liquors, to be there sold or bartered for general use as a beverage, does not necessarily infringe any right, privilege, or immunity secured by the constitution of the United States, is made clear by the decisions of this court, rendered before and since the adoption of the fourteenth amendment; to some of which, in view of questions to be presently considered, it will be well to refer.

In the License Cases, 5 How. 504, the question was whether certain statutes of Massachusetts, Rhode Island, and New Hampshire, relating to the sale of spirituous liquors, were repugnant to the constitution of the United States. In determining that question, it became necessary to inquire whether there was any conflict between the exercise by congress of its power to regulate commerce with foreign countries, or among the several states, and the exercise by a state of what are called police powers. Although the members of the court did not fully agree as to the grounds upon which the decision should be placed, they were unanimous in holding that the statutes then under examination were not inconsistent with the constitution of the United States, or with any act of congress. * * * Mr. Justice McLean, among other things, said: "A state regulates its domestic commerce, contracts, the transmission of estates, real and personal, and acts upon internal matters which relate to its moral and political welfare. Over these subjects the federal government has no power. * * * The acknowledged police power of a state extends often to the destruction of property. A nuisance may be abated. Everything prejudicial to the health or morals of a city may be removed." * * *

* * * In Beer Co. v. Massachusetts, 97 U. S. 33, it was said

that, "as a measure of police regulation, looking to the preservation of public morals, a state law prohibiting the manufacture and sale of intoxicating liquors is not repugnant to any clause of the constitution of the United States." Finally, in Foster v. Kansas, 112 U. S. 206, 5 Sup. Ct. Rep. 97, the court said that the question as to the constitutional power of a state to prohibit the manufacture and sale of intoxicating liquors was no longer an open one in this court. These cases rest upon the acknowledged right of the states of the Union to control their purely internal affairs, and, in so doing, to protect the health, morals, and safety of their people by regulations that do not interfere with the execution of the powers of the general government, or violate rights secured by the constitution of the United States. * * *

It is, however, contended that, although the state may prohibit the manufacture of intoxicating liquors for sale or barter within her limits, for general use as a beverage, "no convention or legislature has the right, under our form of government, to prohibit any citizen from manufacturing for his own use, or for export or storage, any article of food or drink not endangering or affecting the rights of others." * * * It will be observed that the proposition, and the argument made in support of it, equally concede that the right to manufacture drink for one's personal use is subject to the condition that such manufacture does not endanger or affect the rights of others. If such manufacture does prejudicially affect the rights and interests of the community, it follows, from the very premises stated, that society has the power to protect itself, by legislation, against the injurious consequences of that business. * * * But by whom, or by what authority, is it to be determined whether the manufacture of particular articles of drink, either for general use or for the personal use of the maker, will injuriously affect the public? * * * Under our system that power is lodged with the legislative branch of the government. It belongs to that department to exert what are known as the police powers of the state, and to determine, primarily, what measures are appropriate or needful for the protection of the public morals, the public health, or the public safety.

It does not at all follow that every statute enacted ostensibly for the promotion of these ends is to be accepted as a legitimate exertion of the police powers of the state. There are, of necessity, limits beyond which legislation cannot rightfully go. * * * If, therefore, a statute purporting to have been enacted to protect the public health, the public morals, or the public safety, has no

real or substantial relation to those objects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge, and thereby give effect to the constitution.

Keeping in view these principles, as governing the relations of the judicial and legislative departments of government with each other, it is difficult to perceive any ground for the judiciary to declare that the prohibition by Kansas of the manufacture or sale, within her limits, of intoxicating liquors for general use there as a beverage, is not fairly adapted to the end of protecting the community against the evils which confessedly result from the excessive use of ardent spirits. * * * And so, if, in the judgment of the legislature, the manufacture of intoxicating liquors for the maker's own use, as a beverage, would tend to cripple, if it did not defeat, the efforts to guard the community against the evils attending the excessive use of such liquors, it is not for the courts, upon their views as to what is best and safest for the community, to disregard the legislative determination of that question. So far from such a regulation having no relation to the general end sought to be accomplished, the entire scheme of prohibition, as embodied in the constitution and laws of Kansas, might fail, if the right of each citizen to manufacture intoxicating liquors for his own use as a beverage were recognized. Such a right does not inhere in citizenship. * * *

This conclusion is unavoidable, unless the fourteenth amendment of the constitution takes from the states of the Union those powers of police that were reserved at the time the original constitution was adopted. But this court has declared, upon full consideration, in Barbier v. Connolly, 113 U. S. 31, that the fourteenth amendment had no such effect. After observing, among other things, that that amendment forbade the arbitrary deprivation of life or liberty, and the arbitrary spoliation of property, and secured equal protection to all under like circumstances, in respect as well to their personal and civil rights as to their acquisition and enjoyment of property, the court said: "But neither the amendment, broad and comprehensive as it is, nor any other amendment, was designed to interfere with the power of the state, sometimes termed 'its police power,' to prescribe regulations to promote the health, peace, morals, education, and good order of the people, and to legislate so as to increase the industries of the state, develop its resources, and add to its wealth and prosperity." * * *

Upon this ground, if we do not misapprehend the position of defendants, it is contended that, as the primary and principal use

of beer is as a beverage; as their respective breweries were erected when it was lawful to engage in the manufacture of beer for every purpose; as such establishments will become of no value as property, or, at least, will be materially diminished in value, if not employed in the manufacture of beer for every purpose,—the prohibition upon their being so employed is, in effect, a taking of property for public use without compensation, and depriving the citizen of his property without due process of law. * * *

* * * The power which the states have of prohibiting such use by individuals of their property, as will be prejudicial to the health, the morals, or the safety of the public, is not, and, consistently with the existence and safety of organized society, cannot be, burdened with the condition that the state must compensate such individual owners for pecuniary losses they may sustain, by reason of their not being permitted, by a noxious use of their property, to inflict injury upon the community. The exercise of the police power by the destruction of property which is itself a public nuisance, or the prohibition of its use in a particular way, whereby its value becomes depreciated, is very different from taking property for public use, or from depriving a person of his property without due process of law. In the one case, a nuisance only is abated; in the other, unoffending property is taken away from an innocent owner. It is true, when the defendants in these cases purchased or erected their breweries, the laws of the state did not forbid the manufacture of intoxicating liquors. But the state did not thereby give any assurance, or come under an obligation, that its legislation upon that subject would remain unchanged. Indeed, as was said in Stone v. Mississippi, 101 U. S. 814, the supervision of the public health and the public morals is a governmental power, "continuing in its nature," and "to be dealt with as the special exigencies of the moment may require;" and that, "for this purpose, the largest legislative discretion is allowed, and the discretion cannot be parted with any more than the power itself." So in Beer Co. v. Massachusetts, 97 U. S. 32: "If the public safety or the public morals require the discontinuance of any manufacture or traffic, the hand of the legislature cannot be stayed from providing for its discontinuance by any incidental inconvenience which individuals or corporations may suffer." * * *

For the reasons stated, we are of opinion that the judgments of the Supreme Court of Kansas have not denied to Mugler, the plaintiff in error, any right, privilege, or immunity secured to him by

the constitution of the United States, and its judgment, in each case, is accordingly affirmed.[3]

REGULATION OF HOURS OF LABOR.

WITHEY et al. v. BLOEM et al.

163 Mich. 419, 128 N. W. 913. 1910.

The facts are stated in the opinion.

MOORE, J.—The International Seal & Lock Company is a corporation engaged in manufacturing large quantities of seals which are used by railroad companies and shippers of freight for the purpose of locking the doors of freight cars. Aben E. Johnson is an assistant to the general manager of the factory of the said corporation, and the other complainants are women employed by said corporation in its factory. The legislature of 1909 passed an act entitled: "An act to provide for the creation of a department of labor; to prescribe its powers and duties; to regulate the employment of labor; to make an appropriation for the maintenance of such department and to prescribe penalties for the violation of this act." Laws 1909, No. 285. Section 9 of said act provides, in part, that: "No female shall be employed in any factory, mill, warehouse, workshop, clothing, dressmaking or millinery establishment, or any place where the manufacture of any kind of goods is carried on, or where any goods are prepared for manufacturing, or in any laundry, store, shop or any other mercantile establishment, for a period longer than an average of nine hours in a day or fifty-four hours in any week nor more than ten hours in any one day: Provided, however, That the provisions of this section in relation to the hours of employment shall not apply to nor affect any person engaged in preserving perishable goods in fruit and vegetable canning establishments." The complainants filed a bill of complaint in chancery asking to have the provisions of section 9 and section 54 of said act held unconstitutional. The defendants filed a demurrer to the bill of complaint. The demurrer was overruled by the trial court for the reason that the proviso in section 9 was class legislation. The defendants have appealed to this court.

[3] See Childs' Personal Property, §§ 324, 325.

It is not claimed the act is contrary to the provisions of the Constitution of this state because section 29 of article 5 of the Revised Constitution of the State of Michigan reads as follows: "The Legislature shall have power to enact laws relative to the hours and conditions under which women and children may be employed." It is claimed as follows (we quote from brief of counsel): "(a) The law violates the fourteenth amendment to the Constitution of the United States, unless it can be defined as a 'health' law. (b) The law does not purport to be a 'health' law, or to be passed to meet an emergency and to protect the health of women. (c) The law, therefore, if sustained at all, must be sustained on the theory that labor at any employment by women for more than an average of nine hours is harmful, and that a law so restricting female labor is a reasonable exercise of the police power. (d) The law is, however, void as class legislation, since it discriminates between the various classes of female labor." Counsel subdivide each of these heads and argue them at length, citing many authorites which they claim apply.

It must be conceded at the outset that the courts have differed about the questions involved. The most marked difference, however, is between the earlier decisions and the later ones. In Bierly on Police Power, p. 9, it is said: "The police power has been defined to be devoted to the protection of the lives, health, and property of citizens and the maintenance of good order. It is the power of the state to make all manner of reasonable laws for the welfare of the commonwealth and the good people thereof." In Russell on Police Power, at page 28, it is said that "the range of legislation with respect to subjects of governmental control in the exercise of the police power has been much extended within the last quarter of a century. The reason for this is obvious. Modern social life has called into being many agencies not heretofore existing." The learned author then gives many instances of its exercise, among them in the prevention of diseases, the public health, and concerning the hours of labor, and forbidding or regulating contracts for the labor of women and children. The author expresses the opinion that, "with reference to many of the matters above named, there has been a progressive development of governmental functions, and this development is likely to continue with the increased application of science to the business of life."

From what we have quoted from the brief of counsel it is evident that two important questions are presented: First, is the legislation in violation of the fourteenth amendment to the Constitution

of the United States because it interferes with the right to labor and to make contracts in relation thereto? Second, is it class legislation?

In support of the first proposition, counsel cite a number of authorities, one of which (Lochner v. New York, 198 U. S. 45, 25 Sup. Ct. 539, 49 L. Ed. 937) they regard of so much importance that they quote from it at great length in the brief. A consultation of the opinion shows that the labor law which was before the court was not legislation in the interest of women or of minors, but applied to all employes of bakeries. The court said of the legislation which was then before it that the limit of the police power was reached and passed, and that the case differs widely from Holden v. Hardy, 169 U. S. 366, 18 Sup. Ct. 383, 42 L. Ed. 780, and Jacobson v. Masachusetts, 197 U. S. 11, 25 Sup. Ct. 358, 49 L. Ed. 643. In the course of the opinion Justice Peckham, speaking for the court, used the following language: "The general right to make a contract in relation to his business is part of the liberty of the individual protected by the fourteenth amendment of the federal Constitution." * * *

In Muller v. Oregon, 208 U. S. 412, 28 Sup. Ct. 324, 52 L. Ed. 551, which involved the construction of a statute relating to the hours of labor of women employed in laundries, Justice Brewer, who wrote the opinion, referred to the case of Lochner v. New York, *supra*, as follows: "We held, in Lochner v. New York, 198 U. S. 45 (25 Sup. Ct. 539, 49 L. Ed. 937), that a law providing that no laborer shall be required or permitted to work in a bakery more than 60 hours in a week or 10 hours in a day was not as to men a legitimate exercise of the police power of the state, but an unreasonable, unnecessary, and arbitrary interference with the right and liberty of the individual to contract in relation to his labor, and as such was in conflict with, and void under, the federal Constitution. That decision is invoked by plaintiff in error as decisive of the question before us. But this assumes that the difference between the sexes does not justify a different rule respecting the restriction of the hours of labor." He also referred to a copious collection of data as to the course of legislation and expressions in relation to the restrictions imposed upon the labor of women, and proceeds as follows: "While there have been but few decisions bearing directly upon the question, the following sustain the constitutionality of such legislation. Commonwealth v. Hamilton Mfg. Co., 120 Mass. 383; Wenham v. State, 65 Neb. 394, 400, 406 (91 N. W. 421, 58 L. R. A. 825); State v. Buchanan, 29 Wash. 602

(70 Pac. 52, 59 L. R. A. 342, 92 Am. St. Rep. 930); Commonwealth v. Beatty, 15 Pa. Super. Ct. 5, 17. Against them is the case of Ritchie v. People, 155 Ill. 98 (40 N. E. 454, 29 L. R. A. 79, 46 Am. St. Rep. 315). The legislation and opinions referred to in the margin may not be, technically speaking, authorities, and in them is little or no discussion of the constitutional question presented to us for determination, yet they are significant of a widespread belief that woman's physicial structure, and the functions she performs in consequence thereof, justify special legislation restricting or qualifying the conditions under which she should be permitted to toil. * * * It is undoubtedly true, as more than once declared by this court, that the general right to contract in relation to one's business is part of the liberty of the individual, protected by the fourteenth amendment to the federal Constitution; yet it is equally well settled that this liberty is not absolute and extending to all contracts, and that a state may, without conflicting with the provisions of the fourteenth amendment, restrict in many respects the individual's power of contract. * * * That woman's physical structure and the performance of maternal functions place her at a disadavantage in the struggle for subsistence is obvious. This is especially true when the burdens of motherhood are upon her. Even when they are not, by abundant testimony of the medical fraternity, continuance for a long time on her feet at work, repeating this from day to day, tends to injurious effects upon the body, and, as healthy mothers are essential to vigorous offspring, the physical well-being of woman becomes an object of public interest and care in order to preserve the strength and vigor of the race. Still again, history discloses the fact that woman has always been dependent upon man. He established his control at the outset by superior physical strength, and this control in various forms, with diminishing intensity, has continued to the present. As minors, though not to the same extent, she has been looked upon in the courts as needing especial care that her rights may be preserved. Education was long denied her, and while now the doors of the schoolroom are opened and her opportunities for acquiring knowledge are great, yet, even with that and the consequent increase of capacity for business affairs, it is still true that in the struggle for subsistence she is not an equal competitor with her brother. Though limitations upon personal and contractual rights may be removed by legislation, there is that in her disposition and habits of life which will operate against a full assertion of those rights. She will still be where some legislation to protect her seems necessary to secure a real

equality of right. Doubtless there are individual exceptions, and there are many respects in which she has an advantage over him; but, looking at it from the viewpoint of the effort to maintain an independent position in life, she is not upon an equality. Differentiated by these matters from the other sex, she is properly placed in a class by herself, and legislation designed for her protection may be sustained, even when like legislation is not necessary for men and could not be sustained. It is impossible to close one's eyes to the fact that she still looks to her brother and depends upon him. Even though all restrictions on political, personal, and contractual rights were taken away, and she stood, so far as statutes are concerned, upon an absolutely equal plane with him, it would still be true that she is so constituted that she will rest upon and look to him for protection; that her physical structure and a proper discharge of her maternal functions—having in view not merely her own health, but the well-being of the race—justify legislation to protect her from the greed as well as the passion of man. The limitations which this statute places upon her contractual powers, upon her right to agree with her employer as to the time she shall labor, are not imposed solely for her benefit, but also largely for the benefit of all. Many words cannot make this plainer. The two sexes differ in structure of body, in the functions to be performed by each, in the amount of physical strength, in the capacity for long-continued labor, particularly when done standing, the influence of vigorous health upon the future well-being of the race, the self-reliance which enables one to assert full rights, and in the capacity to maintain the struggle for subsistence. This difference justifies a difference in legislation and upholds that which is designed to compensate for some of the burdens which rest upon her."

In the recent case of Ritchie & Co. v. Wayman, 244 Ill. 509, 91 N. E. 695, 27 L. R. A. (N. S.) 994, the court said: "The right of the individual to contract with reference to labor is held inviolable under the Constitution on the ground that the privilege of contracting with reference to labor is a property right, within the purview of the Constitution. Frorer v. People, 141 Ill. 171, 31 N. E. 395, 16 L. R. A. 492. There inhere in the state, however, certain sovereign powers, among which powers is that characterized as the police power, which, when broadly stated, is that power of the state which relates to the conservation of the health, morals, and general welfare of the public, and the property rights of the citizen are always held and enjoyed subject to the reasonable exercise of the police power by the state. If this statute can be

sustained, it must be sustained, we think, as an exercise of the police power. In City of Chicago v. Bowman Dairy Co., 234 Ill. 294, 297, 84 N. E. 913, 914 (17 L. R. A. [N. S.] 684, 123 Am. St. Rep. 100), it was said: 'The police power is said to be an attribute of sovereignty, and to exist without any reservation in the Constitution, and to be founded upon the duty of the state to protect its citizens and to provide for the safety and good order of society. * * * All rights, whether tenable or untenable, are held subject to this police power. Northwestern Fertilizing Co. v. Village of Hyde Park, 70 Ill. 634.' In City of Chicago v. Bowman Dairy Co., *supra*, it was held the regulation of the sale of milk and cream in bottles and glass jars by a city was a proper exercise of the police power, and in City of Chicago v. Schmidinger (243 Ill. 167, 90 N. E. 369), that the bread ordinances of the city of Chicago, which fixed the size of loaves and regulated the sale of bread, were a valid exercise of the police power. From the examples above referred to, found in adjudicated cases, it will be seen that the police power is a very broad power, and may be applied to the regulation of every property right so far as it may be reasonably necessary for the state to exercise such power to guard the health, morals, and general welfare of the public. It is known to all men (and what we know as men we cannot profess to be ignorant of as judges) that woman's physical structure and the performance of maternal functions place her at a great disadvantage in the battle of life; that, while a man can work for more than 10 hours a day without injury to himself, a woman, especially when the burdens of motherhood are upon her, cannot; that, while a man can work standing upon his feet for more than 10 hours a day, day after day, without injury to himself, a woman cannot; that to require a woman to stand upon her feet for more than 10 hours a day and perform severe manual labor while thus standing, day after day, has the effect to impair her health; and that, as weakly and sickly women cannot be the mothers of vigorous children, it is of the greatest importance to the public that the state take such measures as may be necessary to protect its women from the consequences induced by long continuous manual labor in those occupations which tend to break them down physically. It would therefore seem obvious that legislation which limits the number of hours which women shall be permitted to work to 10 hours in a single day in such employments as are carried on in mechanical establishments, factories, and laundries would tend to preserve the health of women and insure the production of vigorous offspring

by them, and would directly conduce to the health, morals, and general welfare of the public, and that such legislation would fall clearly within the police power of the state. Legislation limiting the number of hours which women shall work in establishments similar to those enumerated in the statute now under consideration to a period of not more than 10 hours in any one day has been sustained in Muller v. Oregon, 208 U. S. 412, 28 Sup. Ct. 324, 52 L. Ed. 551; State v. Muller, 48 Or. 252, 85 Pac. 855, 120 Am. St. Rep. 805; Wenham v. State, 65 Neb. 394, 91 N. W. 421, 58 L. R. A. 825; Commonwealth v. Hamilton Mfg. Co., 120 Mass. 383; and Washington v. Buchanan, 29 Wash. 602, 70 Pac. 52, 59 L. R. A. 342, 92 Am. St. Rep. 930."

The case of Muller v. Oregon, *supra*, from which we have quoted at such length, was cited with approval by this court in People v. Case, 153 Mich. 98, 116 N. W. 558, 18 L. R. A. (N. S.) 657. For an interesting discussion of one phase of the police power, see People v. Smith, 108 Mich. 527, 66 N. W. 382, 32 L. R. A. 853, 62 Am. St. Rep. 715.

We think it clear that, according to the great weight of modern authority, the provisions of the law are not unconstitutional.

Second, is the law class legislation? * * *

In Spurr v. Travis, 145 Mich. 721, 108 N. W. 1090, 116 Am. St. Rep. 330, the "sales in bulk act," so called, was attacked upon the ground of being class legislation, and it was there held that it was not class legislation, though its operation was limited to merchants and to those merchants who owe no debts.

The case of Mt. Vernon-Woodberry Cotton Duck Co. v. Insurance Co., 111 Md. 561, 75 Atl. 105, is directly in point. In this case the statute forbids the employment of children under 12 years of age in the mills and factories of the state "other than the establishments for manufacturing canned goods." It was held that the legislation was not class legislation.

In the case of Ritchie & Co. v. Wayman, 244 Ill. 509, 91 N. E. 695, 27 L. R. A. (N. S.) 994, from which we have already quoted, it was argued that the statute was class legislation. The court decided it was not open to that objection. * * *

* * * We conclude the legislation is not unconstitutional, and that it is not class legislation.

The decree of the lower court is reversed, and one may be entered here dismissing the bill of complaint, with costs of both courts.[4]

[4] See Childs' Personal Property, § 327.

Compulsory Vaccination.

JACOBSON v. COMMONWEALTH OF MASSACHUSETTS.

197 U. S. 11, 25 Sup. Ct. Rep. 358, 49 L. Ed. 643. 1905.

The facts are stated in the opinion.

Mr. Justice Harlan.—This case involves the validity, under the Constitution of the United States, of certain provisions in the statutes of Massachusetts relating to vaccination.

The Revised Laws of that commonwealth, chap. 75, § 137, provide that "the board of health of a city or town, if, in its opinion, it is necessary for the public health or safety, shall require and enforce the vaccination and revaccination of all the inhabitants thereof, and shall provide them with the means of free vaccination. Whoever, being over twenty-one years of age and not under guardianship, refuses or neglects to comply with such requirement shall forfeit $5."

An exception is made in favor of "children who present a certificate, signed by a registered physician, that they are unfit subjects for vaccination." § 139.

Proceeding under the above statutes, the board of health of the city of Cambridge, Massachusetts, on the 27th day of February, 1902, adopted the following regulation: "Whereas, smallpox has been prevalent to some extent in the city of Cambridge, and still continues to increase; and whereas, it is necessary for the speedy extermination of the disease that all persons not protected by vaccination should be vaccinated; and whereas, in the opinion of the board, the public health and safety require the vaccination or revaccination of all the inhabitants of Cambridge; be it ordered, that all the inhabitants of the city who have not been successfully vaccinated since March 1, 1897, be vaccinated or revaccinated."

Subsequently, the board adopted an additional regulation empowering a named physician to enforce the vaccination of persons as directed by the board at its special meeting of February 27th.

The above regulations being in force, the plaintiff in error, Jacobson, was proceeded against by a criminal complaint in one of the inferior courts of Massachusetts. * * *

The defendant, having been arraigned, pleaded not guilty. The government put in evidence the above regulations adopted by the board of health, and made proof tending to show that its

chairman informed the defendant that, by refusing to be vaccinated, he would incur the penalty provided by the statute, and would be prosecuted therefor; that he offered to vaccinate the defendant without expense to him; and that the offer was declined, and defendant refused to be vaccinated.

* * * A verdict of guilty was thereupon returned.

The case was then continued for the opinion of the supreme judicial court of Massachusetts. That court overruled all the defendant's exceptions, sustained the action of the trial court, and thereafter, pursuant to the verdict of the jury, he was sentenced by the court to pay a fine of $5. And the court ordered that he stand committed until the fine was paid. * * *

The authority of the state to enact this statute is to be referred to what is commonly called the police power,—a power which the state did not surrender when becoming a member of the Union under the Constitution. Although this court has refrained from any attempt to define the limits of that power, yet it has distinctly recognized the authority of a state to enact quarantine laws and "health laws of every description;" indeed, all laws that relate to matters completely within its territory and which do not by their necessary operation affect the people of other states. According to settled principles, the police power of a state must be held to embrace, at least, such reasonable regulations established directly by legislative enactment as will protect the public health and the public safety. * * *

We come, then, to inquire whether any right given or secured by the Constitution is invaded by the statute as interpreted by the state court. The defendant insists that his liberty is invaded when the state subjects him to fine or imprisonment for neglecting or refusing to submit to vaccination; that a compulsory vaccination law is unreasonable, arbitrary, and oppressive, and, therefore, hostile to the inherent right of every freeman to care for his own body and health in such way as to him seems best; and that the execution of such a law against one who objects to vaccination, no matter for what reason, is nothing short of an assault upon his person. But the liberty secured by the Constitution of the United States to every person within its jurisdiction does not import an absolute right in each person to be, at all times and in all circumstances, wholly freed from restraint. There are manifold restraints to which every person is necessarily subject for the common good. On any other basis organized society could not exist with safety to its members. Society based on the rule that each one is a law

unto himself would soon be confronted with disorder and anarchy. Real liberty for all could not exist under the operation of a principle which recognizes the right of each individual person to use his own, whether in respect of his person or his property, regardless of the injury that may be done to others. This court has more than once recognized it as a fundamental principle that "persons and property are subjected to all kinds of restraints and burdens in order to secure the general comfort, health, and prosperity of the state; of the perfect right of the legislature to do which no question ever was, or upon acknowledged general principles ever can be, made, so far as natural persons are concerned." * * *

Applying these principles to the present case, it is to be observed that the legislature of Massachusetts required the inhabitants of a city or town to be vaccinated only when, in the opinion of the board of health, that was necessary for the public health or the public safety. The authority to determine for all what ought to be done in such an emergency must have been lodged somewhere or in some body; and surely it was appropriate for the legislature to refer that question, in the first instance, to a board of health composed of persons residing in the locality affected, and appointed, presumably, because of their fitness to determine such questions. To invest such a body with authority over such matters was not an unusual, nor an unreasonable or arbitrary, requirement. Upon the principle of self-defense, of paramount necessity, a community has the right to protect itself against an epidemic of disease which threatens the safety of its members. It is to be observed that when the regulation in question was adopted smallpox, according to the recitals in the regulation adopted by the board of health, was prevalent to some extent in the city of Cambridge, and the disease was increasing. If such was the situation,—and nothing is asserted or appears in the record to the contrary,—if we are to attach any value whatever to the knowledge which, it is safe to affirm, is common to all civilized peoples touching smallpox and the methods most usually employed to eradicate that disease, it cannot be adjudged that the present regulation of the board of health was not necessary in order to protect the public health and secure the public safety. * * *

Looking at the propositions embodied in the defendant's rejected offers of proof, it is clear that they are more formidable by their number than by their inherent value. Those offers in the main seem to have had no purpose except to state the general theory of those of the medical profession who attach little or no value to

vaccination as a means of preventing the spread of smallpox, or who think that vaccination causes other diseases of the body. What everybody knows the court must know, and therefore the state court judicially knew, as this court knows, that an opposite theory accords with the common belief, and is maintained by high medical authority. We must assume that, when the statute in question was passed, the legislature of Massachusetts was not unaware of these opposing theories, and was compelled, of necessity, to choose between them. * * * The state legislature proceeded upon the theory which recognized vaccination as at least an effective, if not the best-known, way in which to meet and suppress the evils of a smallpox epidemic that imperiled an entire population. * * *

Whatever may be thought of the expediency of this statute, it cannot be affirmed to be, beyond question, in palpable conflict with the Constitution. Nor, in view of the methods employed to stamp out the disease of smallpox, can anyone confidently assert that the means prescribed by the state to that end have no real or substantial relation to the protection of the public health and the public safety. Such an assertion would not be consistent with the experience of this and other countries whose authorities have dealt with the disease of smallpox. And the principle of vaccination as a means to prevent the spread of smallpox has been enforced in many states by statutes making the vaccination of children a condition of their right to enter or remain in public schools. Blue v. Beach, 155 Ind. 121, 50 L. R. A. 64, 80 Am. St. Rep. 195, 56 N. E. 89; Morris v. Columbus, 102 Ga. 792, 42 L. R. A. 175, 66 Am. St. Rep. 243, 30 S. E. 850; State v. Hay, 126 N. C. 999, 49 L. R. A. 588, 78 Am. St. Rep. 691, 35 S. E. 459; Abeel v. Clark, 84 Cal. 226, 24 Pac. 383; Bissell v. Davison, 65 Conn. 183, 29 L. R. A. 251, 32 Atl. 348; Hazen v. Strong, 2 Vt. 427; Duffield v. Williamsport School District, 162 Pa. 476, 25 L. R. A. 152, 29 Atl. 742.

The latest case upon the subject of which we are aware is Viemester v. White, decided very recently by the court of appeals of New York. That case involved the validity of a statute excluding from the public schools all children who had not been vaccinated. One contention was that the statute and the regulation adopted in exercise of its provisions was inconsistent with the rights, privileges, and liberties of the citizen. The contention was overruled, the court saying, among other things: "Smallpox is known of all to be a dangerous and contagious disease. If vaccination strongly tends to prevent the transmission or spread of this disease, it logically follows that children may be refused admission to the public schools

until they have been vaccinated. * * * Nearly every state in the Union has statutes to encourage, or directly or indirectly to require, vaccination; and this is true of most nations of Europe. * * * A common belief, like common knowledge, does not require evidence to establish its existence, but may be acted upon without proof by the legislature and the courts. * * * The fact that the belief is not universal is not controlling, for there is scarcely any belief that is accepted by everyone. The possibility that the belief may be wrong, and that science may yet show it to be wrong, is not conclusive; for the legislature has the right to pass laws which, according to the common belief of the people, are adapted to prevent the spread of contagious diseases. In a free country, where the government is by the people, through their chosen representatives, practical legislation admits of no other standard of action, for what the people believe is for the common welfare must be accepted as tending to promote the common welfare, whether it does in fact or not. Any other basis would conflict with the spirit of the Constitution, and would sanction measures opposed to a Republican form of government. While we do not decide, and cannot decide, that vaccination is a preventive of smallpox, we take judicial notice of the fact that this is the common belief of the people of the state, and, with this fact as a foundation, we hold that the statute in question is a health law, enacted in a reasonable and proper exercise of the police power." 179 N. Y. 235, 72 N. E. 97.

Since, then, vaccination, as a means of protecting a community against smallpox, finds strong support in the experience of this and other countries, no court, much less a jury, is justified in disregarding the action of the legislature simply because in its or their opinion that particular method was—perhaps, or possibly—not the best either for children or adults. * * *

Before closing this opinion we deem it appropriate, in order to prevent misapprehension as to our views, to observe—perhaps to repeat a thought already sufficiently expressed, namely—that the police power of a state, whether exercised directly by the legislature, or by a local body acting under its authority, may be exerted in such circumstances, or by regulations so arbitrary and oppressive in particular cases, as to justify the interference of the courts to prevent wrong and oppression. Extreme cases can be readily suggested. Ordinarily such cases are not safe guides in the administration of the law. It is easy, for instance, to suppose the case of an adult who is embraced by the mere words of the act, but yet to subject whom to vaccination in a particular condition of his

health or body would be cruel and inhuman in the last degree. We are not to be understood as holding that the statute was intended to be applied in such a case, or, if it was so intended, that the judiciary would not be competent to interfere and protect the health and life of the individual concerned. * * * Until otherwise informed by the highest court of Massachusetts, we are not inclined to hold that the statute establishes the absolute rule that an adult must be vaccinated if it be apparent or can be shown with reasonable certainty that he is not at the time a fit subject of vaccination, or that vaccination, by reason of his then condition, would seriously impair his health, or probably cause his death. No such case is here presented. It is the cause of an adult who, for aught that appears, was himself in perfect health and a fit subject of vaccination, and yet, while remaining in the community, refused to obey the statute and the regulation adopted in execution of its provisions for the protection of the public health and the public safety, confessedly endangered by the presence of a dangerous disease.

We now decide only that the statute covers the present case, and that nothing clearly appears that would justify this court in holding it to be unconstitutional and inoperative in its application to the plaintiff in error.

The judgment of the court below must be affirmed.

It is so ordered.

Mr. Justice BREWER and Mr. Justice PECKHAM dissent.

SPEED OF AUTOMOBILES.

COMMONWEALTH v. KINGSBURY.

199 Mass. 542, 85 N. E. 848. 1908.

The facts are stated in the opinion.

KNOWLTON, C. J.—The defendant was convicted of having operated an automobile in violation of law, over a highway legally laid out in the town of Ashfield, from which automobiles were excluded under the authority of the statutes. He took exception to the refusal of the court to make certain rulings requested, which, in a variety of forms, raised the question whether St. 1905, p. 289,

c. 366, § 1, as amended by St. 1906, p. 425, c. 412, § 9, and St. 1907, p. 153, c. 203, were constitutional. * * *

Automobiles are vehicles of great speed and power, whose appearance is frightful to most horses that are unaccustomed to them. The use of them introduces a new element of danger to ordinary travelers on the highways, as well as to those riding in the automobiles. In order to protect the public great care should be exercised in the use of them. Statutory regulations of their speed while running on the highways is reasonable and proper for the promotion of the safety of the public. It is the duty of the Legislature, in the exercise of the police power, to consider the risks that arise from the use of new inventions applying the forces of nature in previously unknown ways. The general principle is too familiar to need discussion. It has been applied to automobiles in different states with the approval of the courts. Com v. Boyd, 188 Mass. 79, 74 N. E. 255, 108 Am. St. Rep. 464; Christy v. Elliott, 216 Ill. 31, 74 N. E. 1035, 1 L. R. A. (N. S.) 215, 108 Am. St. Rep. 196; People v. Schneider, 139 Mich. 673, 103 N. W. 172, 69 L. R. A. 345; People v. MacWilliams (Sup.), 86 N. Y. Supp. 357.

It seems too plain for discussion that, with a view to the safety of the public, the Legislature may pass laws regulating the speed of such machines when running upon highways. The same principle is applicable to a determination by the Legislature that there are some streets and ways on which such machines should not be allowed at all. In some parts of the state, where there is but little travel, public necessity and convenience have required the construction of ways which are steep and narrow, over which it might be difficult to run an automobile, and where it would be very dangerous for the occupants if automobiles were used upon them. In such places it might be much more dangerous for travelers with horses and with vehicles of other kinds if automobiles were allowed there. No one has a right to use the streets and public places as he chooses, without regard to the safety of other persons who are rightly there. In choosing his vehicle, every one must consider whether it is of a kind which will put in peril those using the streets differently in a reasonable way. In parks and cemeteries and private grounds, where narrow roads with precipitous banks are sometimes constructed for carriages drawn by horses, it has been a common practice to exclude automobiles altogether, chiefly because of the danger of their frightening horses.

The general principle referred to was applied long ago to a different kind of vehicle, in Com. v. Stodder, 2 Cush. 562, 48 Am. Dec.

679, a case which relates to an ordinance of the city of Boston, prescribing the streets on which certain omnibuses might be run and excluding them from other streets. A part of the opinion is as follows: "We perceive nothing objectionable in an ordinance by the mayor and aldermen, providing for the safety and convenience of the public generally, by prescribing by a general law or ordinance certain streets or portions of streets to be used for travel by vehicles exposing, by their manner of use, the lives and limbs of the public generally who may have occasion to use the public streets indiscriminately; and such regulations and restrictions might be warranted, even to effect the minor object, that of preventing and greatly obstructing the free and convenient use of the streets for general purposes, by interdicting carriages of unusual size, or drawn by an unusual number of animals, or those of such character as would greatly interfere with the public convenience and safety. To take a strong case: Suppose the proprietor of the omnibuses from Roxbury should deem it expedient to propel his carriages by steam power, passing through Washington street at a rapid rate, would it not be a lawful and proper regulation for the mayor and aldermen to prohibit the using of Washington street by vehicles propelled by steam power? We cannot doubt that it would be."

The right of the Legislature, acting under the police power, to prescribe that automobiles shall not pass over certain streets or public ways in a city or town, seems to us well established both upon principle and authority. * * *

Exceptions overruled.[5]

LICENSING OF BARBERS.

TEMPLAR v. MICHIGAN STATE BOARD OF EXAMINERS OF BARBERS.

131 Mich. 254, 90 N. W. 1058. 1902.

[The relator, Arthur G. Templar, brought mandamus proceedings against the state board of examiners of barbers to compel them to allow him to take the examination required by law, relative to his fitness to engage in his trade.]

[5] See Childs' Personal Property, §§ 116, 327.

The facts are stated in the opinion.

Montgomery, J.—Act No. 212 of the Public Acts of 1899 provides for the examination and licensing of barbers. Section 5 provides for an examination of an applicant concerning his ability to prepare and fit for use tools and utensils used by barbers, including the proper antiseptic treatment of razors, etc., * * * and further provides that no person so examined shall receive such certificate who at the time of such examination is an alien. The relator applied to the defendant board to take the examination required by law, setting up that he is a resident of the city of Detroit; that he was born in Canada, and follows the trade of a barber as a means of livelihood; and that he has declared his intention of becoming a citizen of the United States. The board refused to receive the application upon the ground that he was an alien. The question presented is whether the provision of the act which requires an applicant to be a citizen of the United States is valid. The relator contends that this provision is invalid, for the reason that it violates the provisions of the fourteenth amendment of the constitution of the United States, which declares that no state shall deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

* * * Speaking generally, Mr. Tiedeman, in his work on State and Federal Control of Persons and Property, at page 331, says: "States have, by legislation, undertaken to protect native labor against alien labor; but in each case the legislation has been declared to be an invasion of the jurisdiction of the United States government, and an unconstitutional interference with the rights of resident aliens."

The attorney general contends that under the police power the legislature may regulate callings, trades, and professions, and that it is not for the courts to pass upon the wisdom of their regulations, and that, if such regulations result in excluding aliens from the privileges which citizens enjoy, it still should be held within the power of the legislature. Attention is directed to the cases of People v. Moorman, 86 Mich. 433, 49 N. W. 263; Same v. Phippin, 70 Mich. 6, 37 N. W. 888, and Metcalfe v. State Board, 123 Mich. 661, 82 N. W. 512. The language in People v. Moorman is cited as sustaining the position of the attorney general. Mr. Justice Morse, referring to the case of People v. Phippin, declares in People v. Moorman that "in that case it was substantially held that no person, no mat-

ter how long he had been in the practice of his profession, had a vested right to practice medicine in Michigan." We do not hesitate to reiterate that doctrine. We think it must be considered as settled that in the protection of the public health the legislature has the right to provide for an examination of all persons who seek to engage in the practice of medicine, and to have their qualifications passed upon by a properly constituted board. But the practice of medicine is no more an incident of citizenship than the practice of the trade of a barber. All persons are entitled to enjoy the equal protection of the law, and while it may be competent for the legislature, in the exercise of its police powers, to provide for an examination and licensing of barbers, as was held in State v. Zeno, 79 Minn. 80, 81 N. W. 748, 48 L. R. A. 88, 79 Am. St. Rep. 422, and Ex parte Lucas, 160 Mo. 218, 61 S. W. 218, would it be contended that the legislature might provide that only white persons should be licensed? The learned attorney general, in his brief, makes this statement of the true rule: "When legislation applies to particular bodies or associations, imposing upon them additional liabilities and restrictions, under the police power of the state, which are not purely arbitrary, the law does not violate the equal protection clause of section 1 of the fourteenth amendment to the federal constitution, if all persons brought under its influence are treated alike, under the same conditions and circumstances." We discover nothing faulty in this statement of the rule. But the difficulty with this enactment is that all persons brought under the influence of this legislation are not treated alike, under the same conditions and circumstances. Before the enactment of this statute the plaintiff had the undoubted right to ply his trade in Michigan. In the exercise of the police power, the legislature had the undoubted right to require, as a prerequisite to his plying his trade, that he submit to an examination. But had it the right to require citizenship? If it had the right to couple that with other requirements, it would have the same right to make that the only requirement. In other words, it would have the right to exclude alien labor wholly. We think the cases cited demonstrate that it had not this power. A very different question is presented than in a case of the requirement for admission to the bar, for example, as in such case the statute confers upon the applicant who is admitted to the profession an office. He becomes an officer of the court. So, too, a different question is presented than was before the court in Trageser v. Gray, 73 Md. 250, 20 Atl. 905, 9 L. R .A. 780, 25 Am. St. Rep. 587,—a case much relied upon by the attorney general. In that case the ques-

tion presented was whether aliens could be excluded from engaging in the business of retailing liquors. This is a business peculiar to itself, which might be wholly prohibited by the legislature, and licenses might be confined to a limited number. We need not, therefore, inquire whether such legislation is an infraction of the rights of the individual, not a citizen. But in the present case the relator's business is in no way injurious to the morals, the health, or even the convenience of the community, provided only he has the requisite knowledge upon the subjects prescribed by the legislature to practice his calling without endangering the health of his patrons. To hold that he is not entitled to practice this calling, because not a full citizen of the United States, is to deny to him rights which we think are preserved by the fourteenth amendment. It is not contended that the elimination of this provision will defeat the purposes of the law wholly, but it is very properly assumed by both sides that the statute may still be operative, with this provision eliminated, if otherwise valid.

The writ of mandamus will issue as prayed.

Long, J., did not sit. The other justices concurred.[6]

Lost Property.

Nature of.

SOVERN v. YORAN.

16 Oreg. 269, 20 Pac. 100, 8 Am. St. 293. 1888.

Trover for the conversion of two packages of money.

The facts are stated in the opinion.

Lord, C. J.—This was an action of trover brought by the plaintiff, as administrator, against the defendant, for the conversion

[6] The prohibition by a state of the manufacture and sale of cigarettes is a legitimate exercise of the police power. Austin v. State of Tennessee, 179 U. S. 343, 21 Sup. Ct. Rep. 132, 45 L. Ed. 224.

Requiring tenement houses to have a supply of water on each floor is a valid exercise of the police power. Health Dept. of City of New York v. Rector, etc., 145 N. Y. 32, 39 N. E. 833, 27 L. R. A. 710.

An ordinance regulating the manufacture and sale of bread is a valid exercise of the police power. People v. Wagner et al., 86 Mich. 594, 49 N. W. 609, 13 L. R. A. 286.

An ordinance prohibiting the "brokerage" of theater tickets at an advanced price is not a valid exercise of the police power. People v. Steele, 231 Ill. 340, 83 N. E. 236, 14 L. R. A. (N. S.) 361.

of two certain packages of money, alleged to have been the property of the deceased. After denying the facts thus alleged, the defendant set up as a defense, in substance, these facts: That at the time alleged, upon the premises owned and occupied by the defendant, one Hugh Gray and Darwin E. Yoran each found a purse of money, and that they delivered said packages to the defendant, to be disposed of according to law, and subject to their claim as such finders; that the defendant, as such holder of the money, in compliance with the statutes in such case, did give the required notice to the clerk of the county, by posting in two public places, and by publication in the Oregon State Journal, etc.; that no owners appeared within one year from the date of said notice, and claimed said sums of money, and that before any notice was given to the defendant of any claim to the same, and before the commencement of this action, in compliance with the statutes aforesaid, he did deliver to the county treasurer one-half of said money, and to the said Gray and Yoran the other half; that said sums of money were delivered to the defendant as bailee of said finders, and that he delivered that portion to which each was entitled, and paid over to the treasurer the respective sums as aforesaid, etc. * * *

By the evidence in the bill of exceptions it appears that the money in controversy was found in two cans under the floor in the barn, and that the finders were two boys, who thus substantially describe the circumstances of the finding. One of them testifies: "There was one plank that was not nailed down, and had a small hole in it as though the rats had gnawed it. It was about two feet long. When that piece of flooring was lifted up, Hugh Gray found the can of money. We counted it, and there was $925.85 in gold and silver. Afterwards I found another can, about a half foot from the one Hugh Gray found; seemed to be a yeast powder can. It was about five inches long, and had in it $1,000 in gold coin. I took the money to my father and handed it to him." After inquiring of the boys where they had found the money, etc., the defendant testified: "I took it, and brought it to the county treasurer, and related to him the circumstances, and he placed it in his safe. Then I returned home." * * *

The court instructed the jury, among other things, that "if the defendant was proceeding honestly, under the supposition that the money was lost property, it would not of itself constitute conversion, although he was mistaken about the facts of the money being lost, and in his attempt to proceed in reference to the law of lost

money;" to which the plaintiff excepted. The jury returned a verdict in favor of the defendant.

From this statement it is sufficient to say that the contention of counsel for the plaintiff was that the answer of the defendants, and the evidence offered by him, established, in law, conversion, and that the court should have instructed the jury to that effect, and not as above stated. They proceeded upon the hypothesis that the money was not lost, but intentionally deposited in the place mentioned for safe-keeping, and that the admitted acts of the defendant in relation thereto were inconsistent with the rights of the true owner, and in law constituted a conversion. Ever since the decision of Lord Chief Justice Pratt in Armory v. Delamirie, 1 Strange 504, it seems to be settled law that the finder of lost money has a valid claim to the same against all the world except the true owner, and generally it may be said that the place in which it is found creates no exception to this rule. "But property," said Trunkey, J., "is not lost in the sense of the rule if it was intentionally laid on a table, counter, or other place by the owner, who forgot to take it away, and in such case the proprietor of the premises is entitled to retain the custody. Whenever the surroundings evidence that the article was deposited in its place, the finder has no right of possession against the owner of the building." Hamaker v. Blanchard, 90 Pa. St. 379.

Strictly speaking, it may be said that, before a thing can be found, it must have been lost; and property which the owner has simply or intentionally laid down or deposited in some place, and for the time forgotten where it was left or put, in legal intendment, can hardly be considered as lost. "The loss of goods, in legal or common intendment," said Reese, J., "depends upon something more than the knowledge or ignorance, the memory or want of memory, of the owner, as to their locality at any given moment. If I place my watch or pocketbook under my pillow in a bedchamber, or upon a table or bureau, I may leave them behind me, indeed, but, if that be all, I cannot be said with propriety to have lost them. To lose is not to place or put anything carefully and voluntarily in the place you intend, and then forget it. It is casually and involuntarily to part from the possession; and the thing is then usually found in a place or under circumstances to prove to the finder that the owner's will was not employed in placing it there." Lawrence v. State, 1 Humph. 229.

The distinction is to be noted between the cases in which the thing or property is actually lost and those in which it is intentionally

left or deposited in its place,—cases in which, as Baron PARKE said, "the taker is not justified in concluding that the goods were lost, because there is little doubt he must have believed that the owner would know where to find them again, and he had no pretense to consider them abandoned or derelict." Reg. v. Thurborn, 1 Denison, Cr. Cas. 395.

Upon the theory that the case in hand is parallel in principle with the class last named, it may be argued that the defendant, being the owner of the property in which the money was deposited, was entitled to the possession as against the finders, and their delivery to him did not make him in law bailee for them, but required him, as was said in McAvoy v. Medina, 11 Allen 548, "to use reasonable care for the safe-keeping of the same until the owner shall call for it," and that when he undertook to treat it as lost property, and actually delivered one-half of the money to the county treasurer and the other half to the finders, he acted in derogation of the rights of the true owner, by the exercise of dominion over it, which rendered him answerable in trover for conversion.

At common law the finder of lost property was bound to hold it for the true owner, and was liable for misdelivery. In Isaack v. Clark, 2 Bulst. 306, Lord COKE says: "When a man doth find goods, it hath been said, and so commonly held, that, if he doth dispossess himself of them, by this he shall be discharged; but this is not so, as appears by 12 E. 4th, fol. 13, for he which finds goods is bound to answer him for them who hath the property; and if he deliver them over to any one, unless it be unto the right owner, he shall be charged for them, for at the first it is in his election whether he will take them or not into his custody, but, when he hath them, one only hath the right unto them, and therefore he ought to keep them safely. If a man, therefore, which finds goods, if he be wise, he will then search out the right owner of them, and so deliver them unto him. If the owner comes unto him, and demands them, and he answers him that it is not known unto him whether he be the true owner of the goods or not, and for this cause he refuseth to deliver them, this refusal is no conversion, is he do keep them for him."

The duty of the finder to ascertain who is the true owner before he makes a delivery, and his liability in case of misdelivery, is here clearly stated. But our statute, as we shall presently see, has innovated this rule, and the finder, after doing the things prescribed for the purpose of ascertaining the true owner, is required, after the expiration of a year, to turn over one-half to the county, and entitled to keep the other half of such lost property, and, in case

of neglect or failure to do so, the county may bring an action against such finder to recover the same. So that, if the owner should afterwards appear, such acts upon the part of the finder, done in pursuance of law, would not render him liable for conversion. Nor at common law, "if the owner comes unto him and demands them," and he does not know him, and for this reason refuses to deliver such lost property to him, is his refusal a conversion. In such case, acting in good faith and with fairness, his mistake cannot be urged against him, and will not render him liable in trover.

In some important particulars the facts in the case in hand are more akin to what is known as "treasure trove;" that is, "where any money is found hid in the earth, but not lying on the ground, and no man knows to whom it belongs." Now, the surrounding facts indicate that the money was intentionally deposited in the place where found for concealment. Until after the money was distributed as stated, the owner was unknown. So that during the possession of the defendant there was present all the elements constituting treasure trove. There was the hiding, the secrecy, that unknown owner,—in fact, dead owner,—and unknown representatives. It is only when the owner appears, or is shown, that the title of the king vanishes as heir to him who was presumed to be dead,—in a word, when the owner is made known,—it ceases to be treasure trove. But while that fact lies hid, while the case stands of money found hid in the earth, and the owner unknown, after diligent search, and the finder treats the property as treasure trove, and then afterwards the owner appears, the only effect is to destroy the character of such property as treasure trove, and thus defeat the title of the king or sovereign, but it does not render the finder liable for conversion. His mistake, if such it may be called, like the refusal of the finder to deliver, on demand, lost property when the owner is unknown to him, is no conversion; for he is justified in his conduct at the time in treating it as treasure trove by the presence of all the elements which constitute it such.

The record shows that the defendant bought the property in at an administrator's sale, and entered into possession, and while thus in possession the boys found the money in the manner and under the circumstances already stated. It was delivered by them to the defendant as their agent or bailee, for the purpose of ascertaining its owner. Neither he nor they knew who the owner was, nor were there any marks on the money or otherwise by which the owner could be known. What was the defendant to do? Here was money

evidently deposited for concealment, found upon his premises, and the owner of it unknown.

Our statute provides that "if any person shall find any money," etc., "and if the owner thereof is unknown, such person shall within five days after finding such give notice thereof in writing to the county clerk, and also cause a notice thereof to be posted in two public places," etc., and if the amount found exceed $15 he "shall, in addition to the preceding requirements, within 15 days," etc., "cause notice thereof to be published in a newspaper printed in the county," etc.; "and if no person shall appear to claim the same," etc., "within two months, he shall procure the appraisal thereof by a justice of the peace," etc.; and, further, "if the owner of such lost money," etc., "appear within one year after notice given," etc., "and make out his right thereto, he shall have restitution," etc.; but, if such owner shall not appear within one year, then the finder shall pay one-half, after deducting all legal charges, to the treasurer of the county, etc.; and, in case of neglect to do so on demand, "after the expiration of the year," the same may be sued for by the county. Code, §§ 3708-3710.

The defendant, not knowing to whom the money belonged, and there being no marks, or other *indicia*, by which the owner could be ascertained, treated the money as subject to the provisions of this statute.

The language of the first section is that "if any person shall find any money or goods, and if the owner of it be unknown, such person shall," etc. This seems to have been interpreted to mean that when money or goods is found, and the owner of it is unknown, it applies as well to money or goods hidden in the earth which had been found, and whose owner was unknown, as to lost property. Taking this section alone, it might be argued that the intent is to treat property hidden and found as lost property, where the owner is unknown, or to put them on the same footing. In a word, that it contemplates that he who "finds" must necessarily have had no knowledge of the existence of such money or goods until found, and the owner of which is unknown; and that as to such person, whether the money or goods be lost or hidden, it occupies the same relation as to him, and could not have come into his possession except by finding; and consequently money or goods, when found, may include money or goods hidden in the earth or lost upon it; and in either case, if the owner be unknown, the section cited is broad enough to cover either case.

In this view, if money be hidden in the earth for safe-keeping,

unless the owner puts some marks or other *indicia* upon it by which he may be identified or made known, the finder would be justified in treating it as lost property. But this construction is hardly tenable, for, strictly speaking, it is only money or goods which have been lost that can be said to be found; and the succeeding provisions of the statute make it plain, and beyond all doubt, that the statute was only intended to apply to lost money or goods, which, as we have seen, is property that the owner has casually or involuntarily parted with, and not property which the surroundings evidence that the owner deposited intentionally in the place where found for safe-keeping.

As the effect of this statute is to innovate the common-law rule in destroying the title of the owner of lost property, after a certain period, upon compliance with its provisions, it certainly ought not, by construction or otherwise, to be extended to cases which do not plainly come within its purview, or other than those which upon the facts are properly denominated "lost property." Money or goods, therefore, when found, although the owner is unknown, which has been hidden in the earth by him for safe-keeping, is not property of which he has involuntarily parted with the possession, or lost property to which the statute applies; and in such case, if the finder undertakes to treat or deal with it as lost property, his acts thereby will not impair the title of the true owner, or defeat his right to recover it.

But did the act of the defendant in thus treating the money constitute conversion? It must be admitted that, prior to the distribution of the money according to the statute, all the acts of the defendant, by advertisement and otherwise, were done, not in derogation of the rights of the owner, but to ascertain who was such owner, and, for the purpose of satisfactory proof, of delivering his property to him. As these means failed to ascertain to whom the money belonged, and there being no clue, by any marks, to its ownership, upon the assumption that the statute governed in the premises, and that the finders would be liable to suit unless distributed according to its provisions, the defendant for them delivered one-half to the county and the other half to the finders. In doing this he asserted no right or title of himself or them to the money, nor any as against the owner or his representatives, who were unknown; but he acted in good faith, upon mistaken assumption that the law required him, or those for whom he acted, to do what was done. The defendant did not assume the right to dispose of the property, nor to assert any dominion over it, by virtue

of any claim or title of his own or the finders, and consequently there was no conversion, nor any prejudice to the rights of the plaintiff by the instruction complained of.

The judgment must be affirmed.[7]

MISLAID PROPERTY.

KUYKENDALL v. FISHER.

61 W. Va. 87, 56 S. E. 48, 8 L. R. A. (N. S.) 94. 1906.

The facts are stated in the opinion.

POFFENBARGER, J.—A writ of error to the circuit court of Mineral county has brought here for review a judgment in favor of Edward Kuykendall, an infant, suing by his next friend, against Harry C. Fisher, as administrator of the estate of Ellen Hughes, deceased, rendered by that court on an appeal from a judgment of a justice of the peace, in whose court the action originated. * * *

Fisher, as administrator of Ellen Hughes, sold to one Pierce Helmick, among other household articles, a heating stove. Some time afterwards the plaintiff, Edward Kuykendall, a boy about thirteen years old, while playing about the premises of Helmick, discovered in the stove a small tobacco sack containing a considerable amount of money in gold, and wrapped in a cloth. Not knowing its value, he gave some of it away, and probably lost a portion of it. He gave to Charles Beemas, another boy, $10, who handed it to Mrs. Helmick, and to a boy named Jackson Mayhew $2.50, and on returning home his mother took from him what he had left, amounting to $145. This she took to Fisher, the administrator, and delivered it to him. Thereupon Fisher demanded and received from Mrs. Helmick what she had received, and from the Mayhew boy what he had received, and advertised the fact of the loss of a portion of the money, but was unable to recover any more. * * *

All the instructions given by the court, it will be observed, are predicated upon the hypothesis of the loss of the money. It is further to be noticed that some of the instructions refused embodied the theory that, if the money was found in the stove which had belonged to the estate of Ellen Hughes, it was not to be deemed

[7] See Childs' Personal Property, § 331.

lost money, but, on the contrary, concealed property belonging to the estate of the defendant's decedent. * * * In view of this, it is important to ascertain what the law deems lost property. 19 Am. & Eng. Enc. Law, 2d ed. p. 579, thus defines it, and incidentally states what is not such property, although it may have the semblance of that character: "Goods are lost, in the legal sense of the word, only when the possession has been casually and involuntarily parted with, as in the case of an article accidentally dropped by the owner. If the owner of an article purposely lays it down, intending to take it up again immediately, and he forgets it and leaves it where it is laid (e. g., a purse left on the counter of a shop), or if he lays it away and then forgets where he puts it, such article is not lost, but is merely mislaid, and therefore the incidents of lost goods do not attach." The law, as thus stated, indicates that as to certain persons property may be lost, or deemed to be so, but not lost as to the true owner thereof. Strangers coming upon it, unaware of the circumstances or the means by which it came to the place in which they discover it, may, in the absence of any knowledge indicating the contrary, such as the place in which it is, presume it to be lost, and, as the decisions will reveal, such presumption is indulged by the law. The finder usually has the benefit of it in law until the contrary is shown. But, though the owner does not appear, and it is not known who he is, the circumstances under which the discovery is made are sometimes such as to make it certain that the property has not been lost, but only mislaid, or concealed and forgotten, or hidden by one who has since died, wherefore the place of concealment cannot be ascertained except by search. It may be safely predicated of the decisions that they hold property, discovered under a given state of circumstances, lost for some purposes, but not for others. It depends upon the nature of the action and the parties thereto.

What has been said indicates that the place in which money or property, claimed as lost, was found, is a potent factor in the determination of the question whether it was lost; and so the authorities expressly hold. This fact is immaterial, ordinarily, as between the finder and all persons other than the owner. But, in determining whether the property was lost, or only misplaced or concealed, the important question in this case, it is a most powerful factor. In Durfee v. Jones, 11 R. I. 588, 23 Am. Rep. 528, money has been found in an iron safe which the plaintiff had purchased and left with the defendant for safe-keeping, with permission to use it. The defendant, a blacksmith, using the safe under these circumstances as a

means of caring for his books, found, secreted between the sheet iron exterior and the wooden lining, a roll of bills amounting to $165. Having informed the plaintiff of the discovery and refused to deliver to him the money upon demand, an action was brought for the recovery of it, which resulted in a judgment for the defendant. The court said in the opinion: "We think the money here, though designedly left in the safe, was probably not designedly put in the crevice or interspace where it was found, but that, being left in the safe, it probably slipped, or was accidentally shoved, into the place where it was found, without the knowledge of the owner, and so was lost, in the stricter sense of the word. The money was not simply deposited and forgotten, but deposited and lost, by reason of a defect or insecurity in the place of deposit." Thus the fact that it did not appear to have been deposited in the place in which it was found was decisive of its character as lost money. * * * In Deaderick v. Oulds, 86 Tenn. 14, 6 Am. St. Rep. 812, 5 S. W. 487, the subject of controversy was an unmarked saw log which had been carried by the high water in a river from the owner's premises into a mountain gorge, where it remained for over two years, lodged in drift and unreclaimed. This the court held to be lost property, distinguishing the case from other Tennessee cases in which the property in controversy had been held not to have been lost. In Lawrence v. Buck, 62 Me. 275, a chain found in a river, with one end fastened round a cedar buoy in a dam, and partly covered with gravel was declared lost property. In Clark v. Maloney, 3 Harr. (Del.) 68, logs found afloat in a river were held to be lost property. In Bridges v. Hawkesworth, 7 Eng. L. & Eq. 424, a parcel containing bank notes, picked up from the floor of a shop, was held to be lost property. In Ellery v. Cunningham, 1 Met. 112, bales of cotton found floating in a seaport were held to be lost property. In Mathews v. Harsell, 1 E. D. Smith, 393, bank notes found by a servant in her employer's house were held to be lost property as against a third person; suit having been brought against him for the same by the servant with the assent of the employer.

A few of the cases illustrating the other side of the proposition are the following: In Lawrence v. State, 1 Humph. 228, 34 Am. Dec. 644, it was held that a pocketbook which a person had laid upon a table in a barber shop, to remain there while he should get a bank bill changed, and which, on leaving the shop, he forgot to take with him, but for which he immediately returned to the shop, upon missing it, was held not to be lost property. It had been

formerly held in Porter v. State, Mart. & Y. 226, that lost property could not be the subject of larceny; and the court, in distinguishing the cases, said: "We answer that the pocketbook, under the circumstances proved, was not lost, nor could the defendant be called a finder." In McAvoy v. Medina, 11 Allen 548, 87 Am. Dec. 733, a pocketbook picked up in a barber shop was held not to be lost property, so far as to enable the finder to recover it from the barber to whom he had delivered it. The court said: "This property was voluntarily placed upon a table in the defendant's shop by a customer of his, who accidentally left the same there and has never called for it. The plaintiff also came there as a customer, and first saw the same and took it up from the table. The plaintiff did not by this acquire the right to take the property from the shop, but it was rather the duty of the defendant * * * (owner) to use reasonable care for the safe-keeping of the same until the owner should call for it." In Kincaid v. Eaton, 98 Mass. 139, 93 Am. Dec. 142, an article accidentally left on a desk in a banking room was held not to be lost, although it was advertised as such and a reward promised to the finder upon returning it. In Commercial Bank v. Pleasants, 6 Whart. 375, a package containing $100,000 of bank notes, found on the floor of a fireproof vault, where the custodian thereof had dropped it, thinking he had put it in a box or compartment in the vault, was held not to be lost property, although it was not known to whom it belonged. In Livermore v. White, 74 Me. 452, 43 Am. Rep. 600, the facts were as follows: The owner of a tannery, when removing his hides, omitted to take them all out. The tannery was sold, and many years after the plaintiff, while laboring for the defendant in erecting a factory on the premises, discovered the hides so left. The court held that they were neither lost, abandoned, nor derelict, nor treasure trove. In Huthmacher v. Harris, 38 Pa. 491, 80 Am. Dec. 502, money and other valuables secreted by a decedent in a grain drill were held not to be lost property. In Merry v. Green, 7 Mees. & W. 623, a purse containing money, found in a bureau by a person who had purchased it at public auction, was held not lost property. Money found in a bureau by a person to whom it was delivered for repairs is not lost money. Cartwright v. Green, 8 Ves. Jr. 405.

In order to vest in a finder the absolute right to property, it must appear that the owner has voluntarily and wholly abandoned it, intending not to reclaim it. * * * But the finder of property not so abandoned has ordinarily a right of possession as against

all the world except the rightful owner. * * * But he holds it as a quasi depositary for the benefit of the true owner. He does not hold it as his own property, although it may have been lost in the sense that it was not misplaced or put away for safe-keeping. This is well illustrated in the case of New York & H. R. Co. v. Haws, 56 N. Y. 175, in which it appeared that the defendant had found a sum of money in one of the railway company's cars, which he delivered to the conductor, to be restored to the owner when called for. Later he had demanded the money from the railroad company, to whose treasurer the conductor had given it, and, upon noncompliance with the demand, had brought an action and recovered a verdict. Before judgment, however, the owner of the money demanded it of the railroad company, whereupon the company brought a suit in equity, in which the claims of the respective parties were brought to the attention of the court, and it was held that, upon the appearance of the owner and his demand for the money, all right of the finder was ended. * * * As we have seen, the owner of the premises is, under some circumstances, entitled to the custody and possession of the property for the benefit of the owner, as against the discoverer thereof, while in others he is not; but in the former class it was determined that the property had not been lost, but only forgotten and left where it had been designedly placed. We apprehend that in none of them was there an absolute right of property vested in the finder. The vesting of such a title is in every case dependent upon whether the property has been abandoned by the true owner. The finder has a right of possession independently of that question, but certainly not any more than that, and possibly a presumptive, contingent right of property, both of which fail on the appearance of the true owner. To justify the finder in appropriating money or other property to his own use, the circumstances must be such as to afford reasonable ground for the belief that it has been voluntarily abandoned, and is therefore lost property in the full legal sense of the term. * * *

Many other cases, in dealing with the question where other rights are involved, treat property as lost when it is apparent that it has not been abandoned, and possession of it has been casually, accidentally lost, as where money is found in a highway or other places, in a purse with the name of the owner in it, from which the only reasonable inference is that it was dropped by accident, and not cast away. Under such circumstances, the finder is entitled to the possession of it, and may defend his possession; but he is not treated as the owner. He is simply a sort of depositary. * * *

As we have seen, it has been held, in another class of cases, that property found under certain conditions is not deemed to have been lost, in the sense that the finder is entitled to its possession or a reward for its return, although the owner was not known and it was apparent that he did not know where the property was, as in the case of an article left on a desk in a banking room and purses left in barber shops. In another class of cases it is held that property found concealed in other property, such as bureaus, safes, and machinery, is not lost in the sense of abandoned, unless it appears to have been casually or accidentally placed there. * * * Money found under such conditions constitutes what is known in law as "treasure trove." "This name is given to money or coin, gold, silver plate, or bullion, which having been hidden or concealed in the earth, or other private place, so long that its owner is unknown, has been discovered by accident." * * *

The principles declared by these authorities make it manifest that the plaintiff, in asserting his demand against the defendant, claiming as owner of the money, occupies a position radically different from that of a finder who is resisting the claim of some person other than the owner. That he found the money is only one element in the case. That the situation in which the money was found indicates that it had been placed, rather than lost, there, is another, excluding, or at least tending to exclude, the idea of voluntary abandonment thereof, and so of absolute property in the finder. Whether it got into the stove by accident, and was technically lost in a qualified sense, or was hidden there, and so became technically treasure trove, is, however, a matter of no considerable consequence as between the finder and owner. In either case, the finder holds for the benefit of the owner, as we have seen. * * *

For the errors herein noted, the judgment must be reversed, the verdict set aside, a new trial allowed, and the case remanded.[8]

Treasure Trove.

WEEKS v. HACKETT.

104 Me. 264, 71 Atl. 858, 19 L. R. A. (N. S.) 1201. 1908.

The facts are stated in the opinion.

Whitehouse, J.—These were actions of trover brought by each of these plaintiffs to recover one third in value of a certain quan-

[8] See Childs' Personal Property, § 332.

tity of coins of the United States and of certain foreign coins, alleged to have been found by each plaintiff jointly with the other and with the defendant, Fessenden E. Hackett. It is not in controversy that the coins in question, of the aggregate par value of $1,284.67, were found contained in three metallic cans buried and concealed in the soil and underneath the surface of land owned by one Leonard J. Hackett in the town of New Vineyard, and it appears in evidence that after the coins were found, and prior to the commencement of these actions, the defendant, Fessenden E. Hackett, purchased all the right, title, and interest, if any, which Leonard J. Hackett had in and to these coins as owner of the land where they were found. * * *

The jury returned a verdict in favor of each plaintiff for the sum of $291.90, being one third of the aggregate market value of the coins. * * *

"Treasure-trove" is a name given by the early common law to any gold or silver in coin, plate, or bullion found concealed in the earth, or in a house or other private place, but not lying on the ground; the owner of the discovered treasure being unknown. 1 Bl. Com. 295; 19 Cyc. Law & Proc., p. 339; 28 Am. & Eng. Enc. Law, p. 472; Livermore v. White, 74 Me. 452, 43 Am. Rep. 600; Sovern v. Yoran, 16 Or. 269, 8 Am. St. Rep. 293, 20 Pac. 100. To what extent the doctrine of the English common law in regard to treasure-trove has been merged, in this country, into the law respecting the finding of lost property, and whether, in modern commercial life, the term "treasure-trove" may be held to include not only gold and silver, but the paper representatives of them, are questions not necessary to be considered here (see Huthmacher v. Harris, 38 Pa. 499, 80 Am. Dec. 502, and Danielson v. Roberts, 44 Or. 108, 65 L. R. A. 526, 102 Am. St. Rep. 627, 74 Pac. 913); for while it is not in controversy that the coins here in question clearly fall within the common-law definition of "treasure-trove," the general rule is established by a substantially uniform line of decisions in the American states, with respect to both lost goods, properly so termed, and treasure-trove, that, in the absence of legislation upon the subject, the title to such property belongs to the finder as against all the world except the true owner, and that, ordinarily, the place where it is found is immaterial. Lawrence v. Buck, 62 Me. 275; Durfee v. Jones, 11 R. I. 588, 23 Am. Rep. 528; Hamaker v. Blanchard, 90 Pa. 377, 35 Am. Rep. 664; Bowen v. Sullivan, 62 Ind. 281, 30 Am. Rep. 172; Danielson v. Roberts, *supra;* Armory v. Delamirie, 1 Strange 505. 1 Smith, Lead. Cas. 631; Bridges v

Hawkesworth, 7 Eng. L. & Eq. 424, 21 L. J. Q. B. N. S. 75. The owner of the soil in which treasure-trove is found acquires no title thereto by virtue of his ownership in the land. R. v. Thomas, Leigh & C. C. C. 313; 28 Am. & Eng. Enc. Law, 2d ed. p. 473. According to Bracton, lib. 3, chap. 3, as quoted in Viner's Abridgement: "He to whom the property is shall have treasure-trove, and if he dies before it be found, his executors shall have it, for nothing accrues to the King unless when no one knows who hid that treasure." [20 Vin. Abr. 414.] And according to Lork Coke (3 Inst. 132), the common law originally left treasure-trove to the person who deposited it, or, upon his omission to claim it, to the finder. 2 Kent, Com. 458. The rule of the common law respecting the rights and duties of the finder of lost money or goods has been variously modified by the terms and provisions of local statutes of many states, but the provisions of the Maine statutes (Rev. Stat. chap. 100, §§ 10 *et seq.*) have no reference to the law of treasure-trove.

In Danielson v. Roberts, *supra,* in which the facts were strikingly analogous to those at bar, two boys unearthed on the defendant's premises an old tin can containing gold coin of the value of $7,000. The circumstances under which the money was discovered, the rust-eaten condition of the can in which it was contained, and the place of deposit, tended strongly to show that it had been buried for a long time, and that the owner was probably dead or unknown. It was held that the fact that the money was found on the premises of the defendants in no way affected the plaintiff's right to possession or their duty in relation to the treasure, and that they could maintain trover therefor against the defendants, to whom they had been induced to deliver the money. In a well-reasoned opinion, the court says:

"Ever since the early case of Armory v. Delamirie, 1 Strange 505, where it was held that the finder of a jewel might maintain trover for the conversion thereof by a wrongdoer, the right of the finder of lost property to retain it against all persons except the true owner has been recognized. In that case a chimney sweeper's boy found a jewel and carried it to a goldsmith to ascertain what it was. The goldsmith refused to return it, and it was held that the boy might maintain trover on the ground that, by the finding, he had acquired such a property in the jewel as would entitle him to keep it against all persons but the rightful owner. This case has been uniformly followed in England and America, and the law upon this point is well settled. Sovern v. Yoran, 16 Or. 269, 8 Am. St. Rep. 293, 20 Pac. 100; 19 Am. & Eng. Enc. Law, 2d ed. p. 579. But it is argued

that property is lost, in the legal sense of that word, only when the possession has been casually and involuntarily parted with, and not when the owner purposely and voluntarily places or deposits it in a certain place for safekeeping, although he may thereafter forget it, and leave it where deposited, or may die without disclosing to anyone the place of deposit.

"But, at the present stage of the controversy, it is immaterial whether the money discovered by plaintiffs was technically lost property or treasure-trove; or, if treasure-trove, whether it belongs to the state or the finder, or should be disposed of as lost property if no owner is discovered. In either event the plaintiffs are entitled to the possession of the money as against the defendants, unless the latter can show a better title. The reason of the rule giving the finder of lost property the right to retain it against all persons except the true owner applies with equal force and reason to money found hidden or secreted in the earth as to property found on the surface."

The result, therefore, seems unquestionable that, in the case at bar, the coins sued for belonged to the finder or finders as against all the world except the true owner or his legal representatives, when discovered. * * *

* * * In reaching the conclusion that the discovery of the three cans should be deemed one transaction, and that the participation of the plaintiffs in the discovery of the coins was sufficient to constitute them joint finders with the defendant, the jury in the cases at bar appear to have been governed by the same equitable considerations, and it is the opinion of the court that the verdicts were warranted by the evidence.

Exceptions and motions overruled.[9]

PROPERTY HIDDEN IN THE EARTH.

FERGUSON v. RAY.

44 Oreg. 557, 77 Pac. 600, 1 L. R. A. (N. S.) 477, 102 Am. St. Rep. 648. 1904.

The facts as stated by the court are as follows:

STATEMENT BY WOLVERTON, J.—The plaintiff, being in possession of defendant's premises under a lease, while cutting wood thereon

[9] See Childs' Personal Property, § 331.

in the afternoon of November 14, 1901, discovered a rich specimen of gold-bearing quartz lying on top of the ground. He at once secured a pick and shovel, and on scraping the leaves away he found one or two other small pieces "on top," as he testified, "or almost on top, of the ground, sticking through the ground." On digging through the surface he found others extending to the depth of 10 or 12 inches, in all weighing, approximately, 17½ pounds. There were no indications present of any natural ledge or lode of gold-bearing or other quartz in place, or of any pocket or placer or other natural deposit, the formation in which the specimens were imbedded being described as "a loose surface soil." Plaintiff disposed of a part of the quartz, estimated as being half of it in value, and delivered the remainder, 8¾ pounds in weight, to defendant, Ray. He now brings trover for the quartz thus delivered to the defendant, alleging that it was obtained from him through duress and threats of arrest and imprisonment and false and fraudulent representations. * * * The evidence shows that two trees standing nearest the place of discovery bear some old marks, consisting of one or more blazes, as if made with an ax, and indentations having the appearance of being struck with a hammer or some blunt instrument; that another has been partially peeled, apparently at a more recent date; that many trees and shrubs in the vicinity contain the marks of an ax, and that many more have been cut away and made into wood. * * * Upon this condition of the record, defendant moved for a nonsuit, which being denied, and judgment having been rendered adverse to him, he brings this appeal.

Wolverton, J.—The theory upon which the cause is sought to be maintained is that the quartz, the subject of the dispute, was either lost or abandoned property, and that in either event plaintiff is entitled to its possession or value as against the defendant and all others except the true owner. As the property was found beneath the surface of the earth, not upon it, the question has been presented whether or not it is treasure trove. We are firmly impressed that it cannot be so considered. Treasure trove, and its legal status, according to Blackstone, "is where any money, or coin, gold, silver, plate, or bullion is found hidden in the earth, or other private place, the owner thereof being unknown; in which case the treasure belongs to the King; but if he that hid it be known, or afterwards found out, the owner, and not the King, is entitled to it. Also if it be found in the sea, or upon the earth, it does not belong to the

King, but the finder, if no owner appears. * * * Formerly all treasure trove belonged to the finder, as was also the rule of the civil law. Afterwards it was judged expedient for the purposes of the state, and particularly for the coinage, to allow part of what was so found to the King; which part was assigned to be all hidden treasure; such as is casually lost and unclaimed, and also such as is designedly abandoned, still remaining the right of the fortunate finder." 1 Bl. Com. Lewis's ed. chap. 8, 295, 296. Bouvier gives the same definition, except that he adds that it includes not only gold and silver, but whatever may constitute riches, as vases, urns, statues, etc. Bouvier, Dict. Mr. Chief Justice Appleton declares that "nothing is treasure trove except gold or silver." Livermore v. White, 74 Me. 452, 456, 45 Am. Rep. 600. So, according to an article found in the Law Times (vol. 81, p. 21), the prerogative of treasure trove is strictly limited, and touches only gold and silver plate and bullion, discarding the baser metals; and in Elwes v. Brigg Gas Co., L. R. 33 Ch. Div. 562, it is said that Roman coins, not being gold or silver coins, did not fall within the royal prerogative of treasure trove. A case has come to our notice where it seems to have been conceded that certain cups, a chalice, pyxes, and a paten, all of silver, were treasure trove (Atty. Gen. v. Moore [1893] 1 Ch. 676), and another where solid gold rings and ornaments were so classed (Queen v. Thomas, 33 L. J. Mag. Cas. N. S. 22). In a case from Pennsylvania (Huthmacher v. Harris, 38 Pa. 491, 80 Am. Dec. 502) the court says, however, of treasure trove: "Though commonly defined as gold or silver hidden in the ground, may, in our commercial day, be taken to include the paper representatives of gold and silver,—especially when they are found hidden with both of these precious metals." This is manifestly an enlargement of the common-law idea of the term, and we have been unable to find any cases that go beyond it. We find expressions by Chancellors Walworth and Kent, however, that would seem to give it further scope, even to the extent of comprising all chattels or goods hidden. We quote from the former in McLaughlin v. Waite, 5 Wend. 405, 21 Am. Dec. 232: "If chattels are found secreted in the earth or elsewhere, the common law presumes the owner placed them there for safety, intending to reclaim them. If the owner cannot be found, he is presumed to be dead, and that the secret died with him. In such cases the property belongs to the sovereign of the country as the heir to him who was the owner; but if they are found upon the surface of the earth, or in the sea, if no owner appears to claim them, it is presumed they have been

intentionally abandoned by the former proprietor; and as such they are returned into the common mass of things, as in a state of nature." And from the latter in his Commentaries (2 Kent, Com. 357): "Nor does this right of acquisition (by finding) extend to goods found hidden in the earth, and which go under the denomination of treasure trove. Such goods, in England, belonged to the King." It is at once apparent, however, that neither of these distinguished jurists was attempting to define treasure trove, but was distinguishing it, as it respects the rights of the finder, from goods found upon the surface of the earth; hence that they intended no innovation upon the common-law idea of the term. Indeed, Chancellor Walworth cites as his sole authority from volumes 1 and 2 of Blackstone's Commentaries, the substance of which, as it relates to the subject in hand, we have quoted above; and it is only upon the principle indicated that the citation supports him at all. But without further reference to the authorities, or attempting to define more precisely the scope and meaning of the term "treasure trove," we may very safely conclude that, in view of the nature of the property in controversy, it does not fall within the classification. It is neither gold nor bullion. It is simply what may be correctly denominated gold-bearing quartz. * * *

This brings us back to the real controversy: Was it lost or abandoned property, or, rather, does the evidence suffice to carry the case to the jury upon that contention? The novelty of the affair is such as to induce hesitation, and to involve us in some doubt, but a careful survey of the authorities impresses us that it cannot be characterized as either lost or abandoned in the sense that the finder is entitled to its possession or ownership as against the owner of the soil. Nor do we think that any reasonable inference that such is its nature and character can be deduced from the evidence, and the case therefore is not one proper for the jury to pass upon. It has been very well understood in this jurisdiction since the case of Sovern v. Yoran, 16 Or. 269, 8 Am. St. Rep. 293, 20 Pac. 100, and the more recent one of Danielson v. Roberts, 44 Or. 108, 65 L. R. A. 526, 102 Am. St. Rep. 627, 74 Pac. 913, what is meant by lost or abandoned property. To lose is casually and involuntarily to part with the possession, so that the mind has no impress of, and can have no recourse to, the event; and, if the property is found on the surface of the earth, the conditions suggest that it has been intentionally abandoned, and as such has returned to the common mass of things, in a state of nature, which belongs to the first occupant or finder, the owner not appearing,

* * * the distinction between losing and abandonment being that one is involuntary, while the other is by intent or design. But the result, as it relates to the property, is practically the same, the owner not appearing to lay claim to it. In the one case the finder has the right to the possession against all except the true owner. In the other he acquires the absolute property by right of his occupancy. It is the presumption of abandonment that obtains until the owner appears and claims the property that gives the right as legal possessor to the first occupier, the presumption being disputable by the rightful owner. Such presumption or inference does not obtain as to property intentionally left or deposited in a designated place, and possibly forgotten for the time being, as the loss depends upon something more than knowledge or ignorance, or the memory, of the owner as to the locality at any given moment. "In such case," says Baron Parke, "the taker is not justified in concluding that the goods were lost, because there is little doubt he must have believed that the owner would know where to find them again, and he had no pretense to consider them abandoned or derelict." * * * The circumstances and conditions of the place where found afforded the *indicia* from which the inference of a losing was deduced. Now, in the case at bar, the quartz was not found on the surface of the earth. True, a small piece or so was picked up from the surface, but, if this were all, there would have been no controversy. The remainder was found imbedded in the earth, and the presumption that it was lost, which attends property found on the surface of the earth, is wanting, so that there was no inference for the jury, deducible from the place of finding and the conditions of the property, that it was lost property. Indeed, the evidence, it would seem, refutes any such presumption or inference. The property was valuable. It had certainly at some time previous been detached by human agency from a ledge, its natural place of deposit; and the evidence that it was once contained in a bag of some kind of cloth, and that trees nearest the place of finding bore some old marks, apparently made by design to aid in locating the property, would indicate that it was voluntarily deposited where found. What effect the elements have had upon the conditions and position in which it was left could only be the merest conjecture. In any event, there could be no inference of a losing or abandonment from the conditions present at the finding, and this is all the knowledge we have respecting the matter; so that the case was not such as was proper to be left to the jury for their determination upon the theory that the property was lost or abandoned. The case

to our minds, falls within the principle of a class of cases which we will now notice, and which counsel for defendant rely upon as controlling. The one most nearly illustrative is South Staffordshire Waterworks v. Sharman, 65 L. J. Q. B. (N. S.) 460. The subject of the controversy there was two gold rings found by a laborer in a pool upon the premises of his employers. He was engaged in cleaning out the pool, and, after throwing out large quantities of mud, came across the rings and some other articles of interest. Lord Russell, in announcing his opinion, quotes from Pollock and Wright on Possession in the Common Law, pp. 40, 41, as follows: "The possession of land carries with it in general, by our law, possession of everything which is attached to or under that land, and, in the absence of a better title elsewhere, the right to possess it also. And it makes no difference that the possessor is not aware of the thing's existence." "It is free to anyone who requires a specific intention as part of *de facto* possession to treat this as a positive rule of law. But it seems preferable to say that the legal possession rests on a real *de facto* possession, constituted by the occupier's general power and intent to exclude unauthorized interference." And then says: "It is upon the principle, expressed in this (the latter) passage, that I base my judgment, for it shows the broad distinction between the present case and the case contemplated in the passage cited to us in course of the argument from Blackstone's Commentaries, showing that a jewel cast into the sea or on the public highway could not be said to be in the possession of anyone, because no one had a right to exclude another from the public place;" and concludes as follows: "The general principle is that where anyone is in possession of house or land which he occupies, and over which he manifests an intention of exercising a control and preventing unauthorized interference, and something is found in that house or on that land by a stranger or a servant, the presumption is that the possession of the article found is in the owner of the *locus in quo.*" Another case is noted in Law Notes (vol. 7, No. 8, p. 160), decided by Supreme Court Justice Forbes, of New York; not so authoritative as the preceding one, as it does not come from a court of appeals, but the principle is recognized. Some ancient dishes, supposed to have been buried by Colonel Edmeston, an officer in the French-Indian war, one hundred and fifty years ago, at a time when he was obliged to flee from the Indians, were recently plowed up, and it was held as to them to be well established that where a thing is imbedded in the soil the right to it is in the owner of the land, unless it is of such a character as to constitute

treasure trove. Other cases announcing the same principle are Elwes v. Brigg Gas Co., L. R. 33 Ch. Div. 562; Reg. v. Rowe, Bell, C. C. 93. Now, we have here property not treasure trove, found imbedded in the soil under circumstances repelling the idea that it has been lost. How long a time it had been in the place where found is conjectural, of course, but it had probably been there many years,—long enough, at least, that only a trace of the cloth bag that once contained it was left; and the ownership of the land where found is in the defendant. Being in the possession of the land, and exercising ownership over it, thus manifesting an intention to prevent unauthorized interference, we must conclude, as was announced by Lord Russell in South Staffordshire Waterworks v. Sharman, 65 L. J. Q. B. (N. S.) 460, that "the presumption is that the possession of the article found is in the owner of the *locus in quo.*"

There was error, therefore, in denying the nonsuit, and the judgment appealed from will be reversed, and the cause remanded for such other proceedings as may seem proper, not inconsistent with this opinion.

Petition for rehearing denied.[10]

ABANDONMENT.

LOG OWNERS' BOOMING CO. v. HUBBELL et al.

135 Mich. 65, 97 N. W. 157, 4 L. R. A. (N. S.) 573. 1903.

The facts as stated by the court are as follows:

STATEMENT BY GRANT, J.—This is an action of replevin, brought in justice's court to recover a small amount of lumber cut from logs taken by the defendants from a rollway on the Muskegon river; plaintiff claiming the right of possession, but not ownership. Plaintiff was organized for the purpose of running, driving, booming, and rafting logs, etc., on Muskegon lake and river, and their tributaries. It claimed authority, by contract from the log owners along this river, to take possession of and run all the logs put in the river, or upon the bank of the river and on the rollways, and deliver them to the various owners at their places of destination. Among

[10] See Childs' Personal Property, § 331.

such were the alleged owners of the logs in question, which were marked with marks claimed to be owned by two firms,—Alberts & Company and Gow & Campbell. Defendants claimed ownership by bill of sale from one Dickinson, the owner by purchase of the land where the rollway, known as the "Carmichæl rollway," was situated. Some were wholly or partly exposed to view. Others were covered with sand and dirt, and grass and bushes had grown over them. Defendants claim title by abandonment: their theory being that the original owners had left these logs in this rollway so long that they had lost title by abandonment, and that, when Dickinson bought the land, title to the logs passed with it. Plaintiff, upon discovering that the defendants had taken the logs, went to their mill, found the lumber manufactured therefrom, and brought this action to recover it. The issue was submitted to a jury, who found in favor of the defendants. Defendants waived the return, and asked judgment for the value.

Grant, J. * * * The main issue was title by abandonment. This issue was left to the jury, and we think correctly. Defendants gave testimony tending to show that these logs had been in this rollway from twenty to thirty years, that they had become imbedded in the sand and earth, and that grass and bushes had grown over many of them. If it be true that the owners had run other logs past them for many years, and had taken no steps to remove those imbedded in the rollway, or any of them, it would not be an unreasonable inference to draw that they were abandoned, because ordinarily they would become decayed and worthless. On the other hand, plaintiff insists that the owners placed them upon the rollway, intending to convey them to places of manufacture and sale, and that, if any floated there and became imbedded in the sand, they were cut and placed in the water with the same intent; and that no intent to abandon, under such circumstances, is to be implied merely from lapse of time. This contention is sound, and is sustained by the authorities. The logs were not lost, for the owners knew that they had logs in this rollway partly buried, and the defendants knew it also. There is evidence that the original owners had taken logs therefrom from time to time. This was a circumstance for the consideration of the jury in determining the intent of the owners. The intention to abandon is essential to maintain defendants' title. This may be inferred from the conduct of the owners and the situation of the property. If these logs were so situated that there was no danger of injury by decay or otherwise,

and the owners had from time to time taken logs therefrom, as they annually drove the river, the intent to abandon could hardly be presumed from lapse of time. If the parties had abandoned logging upon the river, it is apparent that the intent to abandon would be more readily presumed from failure to remove for any considerable length of time. But the mere failure to exercise the act of removal would not operate as an abandonment, or proof of an intention to abandon. Both the intention to abandon and actual relinquishment must be shown. 1 Cyc. Law & Proc. p. 4, and authorities there cited. * * *

Judgment reversed, and new trial ordered.

The other Justices concurred.[11]

RETURN OF LOST PROPERTY.

RYAN v. CHOWN.

160 Mich. 204, 125 N. W. 46. 1910.

Trover for conversion of turkeys.

The facts are stated in the opinion.

BROOKE, J.—The plaintiff in July, 1907, was the owner of a hen turkey and 14 young ones. Defendant, who also owned turkeys, resided about a mile and a half distant from plaintiff's farm. One of defendant's hen turkeys had been astray for some weeks. About the middle of July, defendant, while driving along the highway, in the vicinity of plaintiff's farm, found a hen turkey and chicks in the road. She seems to have believed that the mother bird was the one belonging to her own flock, which was astray. At any rate, she caught the mother and brood of 10, conveyed them to her home and shut them up that night. Upon the same day, she was advised by one Thick, a neighbor of both plaintiff and defendant, who had passed her while she was securing the brood, that he believed she had made a mistake, that he thought the turkey she had taken belonged to plaintiff and that her turkey was on the corner. Plaintiff, missing his brood, and being advised by Thick of the fact that defendant had taken a brood, which he (Thick) believed belonged

[11] See Childs' Personal Property, § 330.

to Ryan, drove over to defendant's farm to make inquiries about his property. There, defendant admitted possession of the brood, said she did not know whether it belonged to Ryan or not, but that if he said it did, he might take it. At that time, the brood was in a field of standing oats and it could not be seen or captured. The oats were cut the following week. A few days later, and after the oats were cut, a note was written by plaintiff, demanding a return of the property, and threatening suit if it was not returned. Upon receipt of this note, defendant claims to have taken the turkey and her brood, one night after dark, back to the place in the highway where she had found them, and there liberated them, without notice to plaintiff, and he has never regained possession of them. Plaintiff, knowing nothing of the return (if such return was made), commenced suit in trover on August 29th, which resulted in a judgment in his favor for $22. Defendant appealed from said judgment to the circuit court, where it was reversed. Plaintiff has removed the case to this court for review on writ of error.

The trial court charged the jury in part as follows: "I charge you, further, that in order for defendant to avoid the liability in an action for trover she must have returned the turkeys to plaintiff, before suit, and the fact that the turkeys were in the neighborhood some time after the commencement of the suit would be no defense to this action. Now, counsel ask me to say to you that if she turned the turkeys loose in the highway, that would not be a return, but I decline to give it in that form, and leave it a question for the jury to determine, whether leaving the turkeys where they were found in the highway was a return of the turkeys to the plaintiff. I say to you that if you find, considering the nature of the turkey in view of all the circumstances of this case, that that was a proper, fair, and reasonable return of the property to Mr. Ryan, if they were his turkeys, and she did that before the suit, and she is sure about the date, then she would not be liable, but if you find that the leaving of them that distance from his house, at that time of day, or evening, or night without giving him any notice was not a fair or reasonable return of the property, then there is no question but that she was liable, if the turkeys were Mr. Ryan's." We think error is properly assigned upon this instruction. The record shows that it is the nature of turkeys to wander. The alleged return, the fact of which, as to time, is not clear upon the record, was not such a return as would relieve defendant from liability, because the property was not in fact, placed in plaintiff's possession, nor was he notified of defendant's act. Assuming that

defendant did just what she claims, her act indicated rather a desire to avoid liability than a purpose in good faith to repossess plaintiff of his property. * * *

The judgment is reversed and a new trial granted.[12]

ESTRAYS.

HAVIRD v. LUNG.

19 Idaho 790, 115 Pac. 930. 1911.

The facts are stated in the opinion.

MAC LANE, District Judge.—This is an action of claim and delivery for a horse. The defendant pleaded the statute of limitations, and the trial court, by an instruction, withdrew this defense from the jury, in consequence of which there was a verdict for the plaintiff, and the defendant has appealed.

The facts shown by the record are that the plaintiff lost the horse in the fall of 1905, and one C. A. Esgate took the horse up as an estray while it was trespassing upon his land on the first of November of that year. He used the horse until February 25, 1908, when he sold him at public auction to Elias Marsters, who used him on his delivery wagon until October, 1908, when he traded him to the defendant in this action, who likewise used him publicly until about June 23, 1909, when the plaintiff saw the horse for the first time since 1905, demanded possession, and, on defendant's refusal to comply with the demand, commenced this action on June 25, 1909.

(1) Upon these facts the court instructed the jury that: "Where property is taken up as estray, the law requires and points out the duty of the person taking up such animal or animals, and, where such party fails to comply with the estray law, his possession of the property thus taken up becomes wrongful, and in my opinion he would not be permitted to plead the statute of limitations in his own behalf against the true owner of the property, and for that reason it is apparent that, while the property was held and possessed by such wrongful holder, the statute of limitations would not run and could not be invoked in behalf of a subsequent purchaser without notice by the person thus taking up the estray."

[12] See Childs' Personal Property, §§ 333, 334.

We think that this instruction misconceives the true purpose both of the estray law, and of the statute of limitations. By section 4054, Rev. Codes, "an action for taking, detaining, or injuring any goods or chattels, including actions for the specific recovery of personal property," must be brought within three years from the accrual of the cause of action. By Laws 1905, p. 366, § 1, which was in force when Esgate took up this horse, and the substance of which is now included in section 1299, Rev. Codes, a person taking up an estray—that is, an animal running at large without sufficient food or shelter, between the first of November and the first of the following March—is required to notify the owner, if known, or, if unknown, the county recorder, whose duty it is to search the brand record and to notify the recorded owner of the brand, if the brand is recorded, and, if not, to notify the constable, who is required to advertise the animal and sell the same. The estray law has nothing to do with the setting of the statute of limitations in motion. By compliance with the statute an absolute title passes to the purchaser at the sale, regardless of the lapse of ime.

(2) Noncompliance with the law makes the possession of the taker-up wrongful, renders him liable to the owner as for a conversion, and leaves him without protection for any expenses which he may have incurred in the care of the animal while in his possession.

(3) So in this case, when Esgate took up the plaintiff's horse, retained possession of him without complying with the estray law, and used the horse as his own, he was guilty of a conversion of the plaintiff's property, and a cause of action at once accrued to the plaintiff against him. "All the cases agree in this, that a right of action accrues in favor of the owner of goods as soon as they are wrongfully taken from his possession, or wrongfully converted by one who rightfully came into possession of them." Harpending v. Meyer, 55 Cal. 555.

(4) "It is a general rule that, where the possession of property is originally acquired by a tort, no demand previous to the institution of suit for its recovery is necessary. It is only when the original possession is lawful, and the action relies upon the unlawful detention, that a demand is required." Sargent v. Sturm, 23 Cal. 359, 83 Am. Dec. 118, quoting Paige v. O'Neal, 12 Cal. 483.

(5) Nor is the nondiscovery by the plaintiff of the whereabouts of the horse material, as in an action of this kind the statute runs from the time of the discovery of the taker, even though the thing taken is secreted or concealed so as to elude discovery. Allen v.

Mille, 17 Wend. (N. Y.) 202; Burt v. Myers, 37 Hun (N. Y.) 277; Lightfoot v. Davis, 132 App. Div. 452, 116 N. Y. Supp. 904.

* * * A case very similar to this is Carr v. Barnett, 21 Ill. App. 137. There it appeared that 10 years before suit was brought the defendant took up a horse as an estray and bought it in at a sale. The court says: "It was conceded that the law in regard to estrays was not fully complied with, and therefore the title did not pass by the sale, but it was insisted that the statute of limitations of five years was a perfect defense. The court held otherwise, and the plaintiff recovered. If the defendant unlawfully appropriated the property to his own use under a claim inconsistent with that of the plaintiff, he is guilty of conversion and the plaintiff might have immediately brought and maintained trover or replevin without making a demand." Judgment was therefore reversed. Another similar case is Leavitt v. Shook, 47 Or. 239, 83 Pac. 391. There the plaintiff's horse strayed from his place in 1893, and its whereabouts were unknown to him until 1905, when, within a few days after its discovery, he commenced his action. The defendant claimed to have purchased the animal in good faith in 1903 from a person who had purchased it from another whom he believed to be the owner, and both the defendant and his predecessor had been in open and notorious possession. The defense of the statute of limitations was sustained. See, also, Thomas v. Brooks, 6 Tex. 369.

It follows that the evidence sustained the defense of the statute of limitations, and the court erred in withdrawing that defense from the jury. The judgment will be reversed, with directions to enter judgment for the defendant, unless the plaintiff applies for a new trial within thirty days from filing the remittitur, in which case a new trial will be granted. Costs are awarded to the appellant.

AILSHIE, P. J., and SULLIVAN, J., concur.[13]

[As to larceny of estrays, see Crockford v. State of Nebraska, 73 Neb. 1, 102 N. W. 70.]

REWARD.

WOOD et al. v. PIERSON.

45 Mich. 313, 7 N. W. 888. 1881.

The facts are stated in the opinion.

GRAVES, J.—Pierson sued in replevin and obtained judgment, and Wood and Chapman filed a bill of exceptions and brought

[13] See Childs' Personal Property, § 331.

error. The subject of the action was a breastpin found by Chapman and claimed by Pierson. Many of the facts are not disputed. Pierson lost at Bay City, July 18, 1878, a small diamond pin, which seems to have separated from the tongue in some unknown way. The circumstances of the loss and the manner in which the body of the pin and tongue became disunited are left unexplained. The metallic setting was a common pattern and the gem had no peculiarities to facilitate its identification by non-experts. Pierson caused a notice to be inserted in the *Tribune*, a newspaper published in the city, of this tenor:

"LOST."

"$25 Reward.—*Lost.*—A diamond pin. The finder will be paid the above reward by leaving the same at this office."

As will be observed the advertisement neither gave a description of the pin nor suggested who offered the reward. Moreover, no means of any kind were provided for showing at the newspaper office the ownership or identity of the pin or for connecting any pin which might be produced with the claim contained in the notice, nor was any money left with which to pay the reward, or any provision whatever made for paying it there.

Chapman found a pin which was subsequently ascertained to be the one in question. His first impression was, when he picked it up, that it was a cheap trinket, but on second thought he decided to show it to a jeweler. Dirt was adhering to it, and attention was at once drawn to the fact that, although the tongue was wholly missing, the rivet was secure and firmly in its place. The query naturally arose as to how this condition of the pin and the absence of the tongue might be accounted for. But in order to find out whether it had any material value, Chapman took it immediately to Wood, the other defendant, he being a jeweler, and was told by him that the stone was a diamond and that a diamond pin had been advertised in the *Tribune*.

On getting this information, Chapman went at once to the newspaper office and saw Mr. Shaw, the editor and manager, who showed him the advertisement and informed him who the author was. Mr. Shaw referred him for anything further to Mr. Pierson, and he at once carried the pin to Pierson's store and called for that gentleman. He was absent. Chapman was going from the city the next morning and he told a clerk, Mr. Martin, that he had found a pin, and as he was going away, he would leave it at Mr. Wood's to be

identified and returned to the owner. He then went to Wood's and there left it with instructions to give it to the person who should identify it and pay the reward, and to no one else. This was on Friday evening, July 26th. The next morning he went from the city on business and only returned the Monday following at noon. During his absence Pierson called on Wood and asked to see the pin in order to identify it and Wood declined and required him to identify it first. Pierson attempted to do so, but he failed to satisfy Wood, and in the judgment of another jeweler to whom both referred, and who also had the advantage of inspecting both the tongue and body of the pin and of comparing them, the physical appearances and indications were strongly against Pierson's claim.

In respect to what was said at these interviews there was want of harmony in the testimony. Pierson requested that another jeweler at Bay City who, he said, had formerly repaired the pin and had a plaster cast of the stone and could identify it, might be permitted to see it. But Wood proposed that this gentleman should call with his mould and he, Wood, could then see for himself whether it fitted or not. The gentleman came but had no cast, and was unable to give a particular description, and Wood declined to show the pin to him. Pierson then proposed that the pin should be sent at his expense for the purpose of identification to Mr. Smith of Detroit who, he said, had mounted it. This was declined and Wood suggested that Pierson should write to Smith for a description, an expedient he observed which would be attended with less risk, but this proposal was unacceptable to Pierson.

The testimony disagreed as to the incidents of the effort to get the question of identification settled through Mr. Smith, and in regard to what took place between Pierson and Chapman after the return of Chapman on the 29th. On Tuesday, the thirtieth of July, Pierson sued out the writ of replevin and went with the sheriff to Wood's store to get the pin. It was not produced and indeed was not then in the store, although the fact was not made known by Mr. Wood. It is unnecessary to recite the different versions of what took place. On the next morning, Wednesday, the thirty-first, Mr. Chapman carried the pin to Detroit and satisfactorily ascertained at Mr. Smith's that it was the one advertised for by Mr. Pierson. He returned on Thursday, and on Friday, the day after, met the officer and handed the pin to him with the request to get the reward. Pierson refused to pay it, and on giving the usual replevin bond, received the pin from the officer. * * *

According to the common law the finder of goods lost on land

becomes proprietor in case the true owner does not appear. And meanwhile his right as finder is a perfect right against all others. But if the true owner does appear, whatever right the finder may have against him for recompense for the care and expense in the keeping and preservation of the property, his status as finder only does not give him any lien on the property. Yet if such owner offer a reward to him who will restore the property, a lien thereon is thereby created to the extent of the reward so offered. This doctrine in favor of a lien in such circumstances is so laid down in Prescott v. Neale, 12 Gray 222, and authorities are cited for it. Among them is the leading case of Wentworth v. Day, by Chief Justice Shaw, reported in 3 Metcalf 352, and which is approved and followed by the Supreme Court of Pennsylvania in Cummings v. Gann, 52 Pa. St. 484, and adopted as correct by Story in his work on Bailments, §§ 121*a* and 621*a*. Parsons has given it his sanction by incorporating it in the text of his work on Contracts, (volume 3, p. 239, 6th Ed.), and Edwards presents it as settled law in his treatise on Bailments, §§ 20, 68 (2d Ed.).

Under this principle the admission is unavoidable that when Pierson claimed the pin, on the footing of his notice and reward of Chapman, the finder, who was holding it for the actual owner, it was, as between them, subject to a lien in Chapman's favor and against Pierson for the reward. According to the language of the books Chapman was entitled to *detain* the article from Pierson until the reward should be paid, and was under no legal obligation to relinquish possession to him or to give it to another or to allow anything to be done endangering his right or security. But there was a mutuality of rights. As claimant, Pierson was entitled to a reasonable time and to fair and reasonable opportunity in reference to the nature of the chattel, the existing state of things bearing on the transaction and the surrounding circumstances, and without impairing Chapman's right as contingent owner, nor his right of lien, nor interfering with his duty to the true ownership which might be subsequently asserted by another, to make such a showing as he could that the property was the same he had lost and advertised, and such evidence as would satisfy a fair and reasonable person of the fact.

It was not for Chapman to baffle investigation by any unfair action or inaction or give way to unfounded and unreasonable suspicion and then object that the evidence of identification was not sufficient. Nor was it for Pierson to demand anything which was not fair and just under the circumstances, and needful for investi-

gation and consistent with Chapman's rights and duties, and then make its refusal a pretext for charging injustice and an excuse for making costs. * * *

Whether as between the parties and in view of all the considerations bearing on their rights and duties and on the conveniences and inconveniences of identification growing out of the nature of the property, and bearing on the chances for imposition, and on the fact of Chapman's being liable to account to whoever should at last be found to be actual owner, it was reasonably and fairly due to Pierson to have a personal inspection to enable him to say that the pin was or was not his property, and if he thought it was, then to facilitate his proof was not a matter of law. It depended on the peculiarities of the case, and was a question for the jury under instructions conforming to the principles here explained.

For the purpose of judging with what propriety the parties acted, and whether Chapman was guilty of legal fault, the transaction must be contemplated as it was on the thirtieth of July when the action was commenced. * * *

The contention touching the right of action, in the absence of any tender of the reward, is of no practical importance on this record. * * * Unless the reward itself was in fact waived or there was such behavior on the part of Chapman respecting Pierson's reclamation as was tantamount to a denial of Pierson's right and a wrongful detention, it is not perceived that there was any ground for holding that the lien was forfeited.

In Isaac v. Clark, 2 Bulstrode 306, Lord Coke states the law in this wise: "When a man doth find goods, it hath been said and so commonly held, that if he do dispossess himself of them, by this he shall be discharged; but this is not so, as appears by 12 Edw. IV. 13, for he which finds goods is bound to answer him for them who hath the property; *and if he deliver them over to any one, unless it be unto the right owner,* he shall be *charged for them;* for at the first it is in his election whether he will take them or not into his custody; but when he hath them, *one only* hath then right unto them, and therefore he ought to keep them safely. A man therefore, which finds goods, if he be wise, will then *search out the right owner* of them, and so deliver them unto him. If the owner comes unto him and *demands them, and he answers that it is not known unto him whether he be the true owner of the goods or not, and for this cause he refuseth to deliver them, this refusal is no conversion if he do keep them for him.*"

Lord Coke very clearly enforces the right and duty of the finder

to be certain of the true owner before he makes delivery. As he is bound to hold for the true owner and is liable in case of misdelivery, the law makes it his duty as well as his right, even when there is no reward, to "search out," or in other language, find the "right owner," or see to it that he submits to no other than the "right owner." Undoubtedly if Chapman's conduct was such that a jury would, under the circumstances of the case, feel satisfied that he was actually perverse and unreasonable and pursued a course which was adapted to baffle fair investigation, instead of maintaining the attitude of a man whose duty it was, in the quaint terms of Lord Coke, to "search out the right owner," it would be just to regard him as having detained the property unlawfully.

The neglect to tender the reward, if it was still claimed, could not defeat the action. Bancroft v. Peters, 4 Mich. 619.

The remedy of trover was originally given to enable the loser of goods to recover of the finder, and the principle has found recognition in one of the provisions of our action of replevin. Section 6754, Comp. Laws.

The statute expressly refers to a case where one party is found to have a lien and the other the general ownership, and the court is required to render such judgment as shall be just. The provision did not escape the attention of the court below. It was mentioned in the charge. The parties respectively ignored the statute concerning lost property and planted themselves on the common law, and hence there seems to be no occasion to notice the former. * * *

It is enough to say now, that whatever may have been intended, the charge, as we find it in the record, must have been received by the jury as instructing them that the defendants were *bound* to submit the pin to the personal inspection of the plaintiff on his request, as a safe and proper expedient for the purpose of "searching out the right owner," and they could not have supposed that it was submitted to them to decide *according to their own judgment of the circumstances* whether the defendants ought or ought not to have allowed such inspection. The question was not for the bench but for the jury under suitable instructions. * * *

The result reached is that the judgment must be reversed, with costs, and a new trial granted.[14]

Campbell, J., and Marston, C. J., concurred.

Cooley, J., did not sit in this case.

[14] See Childs' Personal Property, § 335.

LARCENY BY FINDING.

GRIGGS v. THE STATE.

58 Alabama 425, 29 Am. Rep. 762. 1877.

[Anderson Griggs, the defendant, was indicted for stealing a sack of coffee from one Calvin W. Fenn. He was tried, convicted, and sentenced to three years' imprisonment. The defendant appealed, alleging error on the part of the judge in his charge to the jury,—the particular part excepted to being the following: "or if he did not know but had immediate means of ascertaining or finding out who the owner was, then he is guilty as charged."]

MANNING, J.—Appellant was indicted for the larceny of a sack of coffee. It had dropped from a wagon-load of goods while being hauled from Eufaula to Clayton, about twenty miles distant, along a highway in Barbour county, and not long afterwards, on the same day, found, between three and four miles from Eufaula, just over a fence by the highway, and near some bushes, about fifty yards beyond a gate at which the defendant's ox-wagon was standing, and through which he had to pass on his way home with his wagon. Some circumstances were proved tending to show defendant had put the sack where it was found; but he denied that he had seen it or knew anything about it. * * * There is no evidence in the record that there was any mark on the sack of coffee, or other *indicium*, by which the owner could be known, or any other evidence than that mentioned above, that defendant knew who the owner was. * * *

There is no error in the charge that was given by the judge to the jury. If the defendant feloniously took and carried away the sack of coffee from the public road, and knew when he took it who the owner was, or had immediate means of ascertaining or finding out who the owner was, then he was guilty of larceny thereof. It seems to have been formerly held in England, and is still or lately was held in one or two of the states of this Union, that the finder of an inanimate chattel that was really lost could not be found guilty of stealing it. "Lord Coke lays down the law as drawn from the year books (3 Inst. 107) to be, that if one lose his goods and another find them, though he convert them, *animo furandi*, to his own use, yet it is no larceny." So, "in 2 East's P. C. 663, it is expressly stated that where one finds a purse in the highway, which he takes and carries away, it is no felony, although it may

be attended with all those circumstances which usually prove a felonious intent, such as denying and secreting it." In the People v. Anderson (14 Johns. R. 296) from which the foregoing extracts are taken, the defendant was indicted for stealing a trunk, which (it was believed) had fallen from a stage-coach on the highway and been found by him. The court below instructed the jury that if he took the trunk with intent to steal it, they ought to find him guilty; and that in determining that question, they had a right to take into consideration the prisoner's subsequent conduct as well as all the circumstances in the case. The Supreme Court of New York reversed the judgment, and said: "The bona fide finder of a lost article, or of a lost trunk containing goods, cannot be guilty of larceny by any subsequent act of his in concealing or appropriating to his own use the article or the contents of a trunk thus found.

"There can be no trespass in taking a chattel found in the highway, and the finder has a right to keep the possession against everyone but the true owner. How, then, can it be that a thing found bona fide, and of which the finder has a right to take possession, shall be deemed to be taken feloniously, in consequence of a subsequent conversion, by denying and secreting it with an intention to appropriate it to the use of the finder?" * * *

The idea was, that the finder of an article lost on a highway has a right to it against everybody else than the true owner, and may take it and carry it away. And if he subsequently appropriates it to his own use, he does not thereby subject himself to punishment as a thief, although he may know, when he does so, who the owner is. This is in law a conversion only, very dishonest, it is true, but no larceny. The prevailing doctrine, though, is that if he take it even from a highway, *animo furandi*, with intent to steal it, and this intent exists when he takes it, he is in law guilty of larceny.

But how shall a jury know whether or not the intent to steal existed at the time of the taking? The law, in its humanity, requires them to presume anyone on trial before them to be innocent. The guilt of the accused must be proved; and it must be proved by evidence showing that the intent to steal accompanied the act of taking, and stamped a larcenous character on his conduct from the beginning. * * * The law, therefore, requires that it be further shown that defendant, when he found the article, knew who the owner of it was, or had then and there the means of knowing who it was. Says Mr. Bishop (in the 6th ed. of his Commentaries

on Criminal Law): "A man knowing the owner of goods cannot lawfully pick them up without returning them to him; but a man not knowing the owner can. The doctrine, therefore, is, that if, when one takes goods into his hands he sees about them any marks, or otherwise learns any facts, by which he knows who the owner is, yet with felonious intent appropriates them to his own use, he is guilty of larceny, otherwise not. Some of the cases say if he knows who the owner is or has the means of ascertaining; but the better doctrine is, as before set down, because every man, by advertising and inquiry, can find the owner, if he is to be found, while the guilt of the defendant must attach at that moment, if ever."—2 Vol. E. 882. The doctrine above laid down is that of the case of Regina V. Thurbourn, 1 Denn. C. C. 387 (2 Leading Criminal Cases, 18), in which Baron Parke delivered a long and well considered opinion. A like conclusion was reached in Tanner's case (14 Grattan), by the Court of Appeals of Virginia, after a thorough examination of the cases, including those mentioned in the elaborate note to Regina V. Preston, 2 Lead. Crim. Cases, 31. "We have seen," says Allen, president of the court, "from the authorities, that where there are no *indicia* by which the owner can be found, the appropriation to the finder's use does not amount to larceny; for, as it has been held, the finder of a chattel actually lost is not bound to take any means to discover the owner. He must know him immediately from marks about the property or otherwise." And in a case like the present, it cannot be held that he is bound to wait by the lost goods to see whether the owner will not return for them. Peradventure, the person from whose wagon this sack of coffee dropped might not have discovered the loss of it until his arrival at Clayton. In Commonwealth v. Titus (16 Mass. 42), the Supreme Judicial Court of Massachusetts recognized a like doctrine, namely, that it should be shown that, when the article was found, it was taken by the finder, *animo furandi,* and also that he then knew or had reasonable means of knowing or ascertaining who the owner was. Said Gray, C. J.: "The instruction given did not require the jury to be satisfied merely that the defendant might have reasonably ascertained it, but that at the time of the original taking he either knew or had reasonable means of knowing or ascertaining who the owner was. Such a finding would clearly imply that he had such means within his own knowledge, as well as within his own possession, or reach, at that time.

A distinction is made by the courts between cases in which an article is dropped in a highway, or other place in which it is mani-

festly lost, and those in which it is intentionally left or dropped by the owner in other places—as on a table in a barber's shop, or in a garden of the owner, or in the prisoner's store, or by a departing guest at his hotel. Speaking of such, Parke, Baron, said: "Perhaps these cases might be classed amongst those in which the taker is not justified in concluding that the goods were lost, because there is little doubt he must have believed that the owner would know where to find them again, and he had no pretence to consider them abandoned or derelict." Regina V. Thurbourn, *supra*. But where the goods are found in a highway (as is said in the note to Regina V. Preston, 2 Leading Crim. Cases, P. 34), "if there are no marks upon the property or other *indicia*, by which the owner can be found, the appropriation to the finder's use does not amount to larceny, although he knew the property was not his own." See, also, Lane v. The People, 5 Gillman, Ill. 305, in which it is said: "These authorities proceed on the principle that there cannot be a felonious intent in taking a chattel from the highway, which has no marks about it to designate the owner, the finder in such case having the right to take and retain the possession against everyone but the owner." Perhaps it would be more correct to say that, without some such evidence indicating to the finder at the time of the taking of the chattel, whose it was, if he did not otherwise know it, the law presumes that he took it, innocently and lawfully, because he might do so. By departing from this rule we should obliterate a well defined boundary, on one side, of the crime of larceny. * * *

The charges asked for defendant, and refused, are all founded on the idea, that to make the defendant guilty of larceny, either he must at the time of taking the sack of coffee, have known who the owner was, or that there must have been marks upon it by which he could then be known. The second condition is too narrowly expressed. The defendant, according to the rule laid down, may be found guilty—other things being sufficiently proved—if he has the present means of knowing who the owner is, "by marks on the goods, or otherwise," or, according to Bishop, if, when he takes the goods into his hands, he "sees about them any marks, or otherwise learns any facts, by which he knows who the owner is." It is thus implied that such knowledge may be obtained otherwise than by marks only on the goods. Consequently there was no error in refusing those charges.

Let the judgment of the city court be affirmed. [Judges Brickell and Stone, while concurring in the judgment of conviction,

dissented from some of the principles of law as stated by Judge MANNING. The substance of Judge Brickell's opinion is as follows: Lost property may be the subject of larceny. To establish charge of larceny, two things are necessary. First, felonious intent at time of finding. Second, reasonable belief that owner might be found (such belief may be result of previous knowledge, may arise from nature of chattel found, or from some name or mark upon it), and the *immediate* means of finding him.

No other distinction between lost goods and those in any other situation, than that, at time of finding, intent to steal must exist, and finder must know, or have reasonable means of knowing or ascertaining the owner.

Place of finding is material only in determining whether goods are lost or merely mislaid. If mislaid, the taker is guilty of larceny by appropriation to his own use, whether intent to steal was formed at time of or subsequent to the taking. Larceny may be committed in any place, public or private, in a highway, or in the dwelling of the owner.

Larceny generally includes a trespass; yet every trespass is not larceny. If possession is obtained by trespass, it is not material whether the *animo furandi* then existed or was subsequently formed. In case of lost goods, if felonious intent does not exist at time of finding, no subsequent formation of that intention will convert the taking into larceny. Intent is a question of fact for the jury.][15]

STATE OF IOWA v. HAYES.

98 Iowa 619, 67 N. W. 673, 37 L. R. A. 116. 1896.

[Defendant was convicted of larceny of a sum of money found by him. Appealed.]

The facts are stated in the opinion.

DEEMER, J.—The indictment charges the defendant with having stolen a certain purse or pocketbook, with the contents thereof, consisting of $68 in money. The evidence shows that one Henry Weis lost a pocketbook containing some $68 in money, three receipts which were executed in his name, and a trunk key, upon the street in front of a saloon in the town of Bellevue, in Jackson county,

[15] See Childs' Personal Property, § 337.

Iowa, on the afternoon of the 3d day of July, 1895; that defendant found the pocketbook soon after it had been lost, took it to a barn near the saloon, and, after having extracted the money therefrom, threw the pocketbook into a manger, where it was found the next morning. * * * The defendant was, no doubt, convicted under § 3907 of the Code, which is as follows: "If any person come by finding to the possession of any personal property of which he knows the owner, and unlawfully appropriate the same or any part thereof to his own use, he is guilty of larceny and shall be punished accordingly."

His first contention on this appeal is that the court erred in admitting evidence showing the defendant's possession of the lost property, and his subsequent conversion thereof, for the reason that the *corpus delicti* was not shown. As we understand the claim, it is based upon the thought that there was no evidence showing, or tending to show, that the defendant, at the time he found the property, knew who the owner of it was. It is no doubt true that the finder of lost goods, which have no marks by which the owner could be identified, and who does not know to whom they belong, is not guilty of larceny, even if he does not exercise diligence to discover who the owner of the goods may be. And it is likewise true that the crime must consist in the original taking, and not in a subsequent conversion. But, where the property is so marked as to be capable of identification, proof of the possession and of the immediate subsequent conversion is admissible, and such proof in itself tends to establish the *corpus delicti*. * * * The only distinction made between theft of lost goods and theft of other property seems to be that, at the time of finding, not only must the intent to steal exist, but the finder must know, or have the reasonable means of knowing or ascertaining, the owner. * * *

The evidence with reference to the felonious intent of the defendant in taking the property was ample. On the question as to his knowledge of the ownership, there was testimony to show that defendant had seen the pocketbook in the possession of Weis just prior to the time it was lost. And it further appears that the receipts which were in the purse at the time it was found by defendant clearly and unmistakably identified it as being the property of Weis. Defendant had "the reasonable means of knowing or ascertaining, by these receipts, who the owner was," and, according to the instructions of the court, this was equivalent to actual knowledge.

* * * In the ninth instruction the court told the jury that the state must show, among other things, that the defendant, at the

time he came into the possession of the pocketbook or purse, and its contents, knew that it belonged to the said Weis, or, by an examination of the papers in said pocketbook, might reasonably have known that the said pocketbook, with its contents, belonged to, or was the property of, the said Henry Weis. This same thought is repeated in other instructions. It is insisted that these instructions are erroneous, for the reason that defendant cannot be convicted unless it be shown that he actually knew who the owner of the property was at the time that he found it. That there are a few cases holding to the doctrine contended for will be conceded, but we think the great weight of authority supports the instructions given. * * * The thirteenth instruction told the jury that they were to arrive at the intent of the defendant in taking the property from his conduct with reference thereto at or closely following, the taking of the property, and concluded: "You are therefore to say, from the acts and conduct of the defendant at the time he discovered and took the money from the said pocketbook or purse, whether he did so with the unlawful intent to convert the same to his own use." The part of the instruction quoted is said to be erroneous, because it is said the intent to steal must exist at the time of the finding, and not be formed subsequently to the taking. We think the instruction, as applied to the facts in this case, was not erroneous. He did not find the money until he opened the purse and discovered it therein. As soon as he discovered it he immediately took it, and proceeded to convert or conceal the same. Robinson v. State, 11 Tex. App. 403. Moreover, the court explicitly told the jury, in more than one instruction, that they must find that the defendant, when he found the pocketbook, and discovered and took from it the money therein contained, did so with intent to convert the same to his own use and deprive the owner thereof. We see no error in the instructions given.

* * * We have examined the whole record, as is our duty, and discovered no prejudicial error.

Affirmed.[16]

ROBINSON, J., and GRAINGER, J., dissent.

[16] See Childs' Personal Property, § 337.

The great weight of modern authority seems to be that the finder of property may be guilty of larceny; also that the finder may be guilty of larceny, not only if the owner is known and the intent to steal exists at the time of finding, but also, if, with such intent, he appropriates the goods when there are reasonable means of ascertaining the owner, although such owner is not actually known at the time of the finding.

The finder of mislaid property, if he knows it to be mislaid or left by mistake, and takes it with intent to appropriate it to his own use, is guilty of larceny. State of Connecticut v. Courtsol, 89 Conn. 564, 94 Atl. 973, 1916 A. (L. R. A.) 465.

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